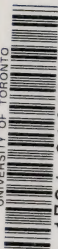


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OMMENTARIES

OF



ON THE



ROMAN



LAW,

WITH AN

English Translation and Annotations,

BY

FREDERICK TOMKINS, Esq., M.A., D.C.L.,

AND

WILLIAM GEORGE LEMON, Esq., LL.B.,

OF LINCOLN'S INN, BARRISTERS-AT-LAW.

LONDON:

BUTTERWORTHS, 7, FLEET STREET,

Law Publishers to the Queen's Most Excellent Majesty.

EDINBURGH:—T. & T. CLARK, AND BELL & BRADFUTE.

DUBLIN:—HODGES, SMITH, & FOSTER.

BOSTON, UNITED STATES OF AMERICA:—LITTLE & BROWN

1869.

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TO THE

RIGHT HONOURABLE WILLIAM PAGE,
BARON HATHERLEY,

Lord High Chancellor of St. Britain,

THIS WORK IS

BY HIS KIND PERMISSION DEDICATED

As AN EXPRESSION OF DEEP AND SINCERE RESPECT
FOR HIS LORDSHIP AS THE HEAD OF THE LEGAL PROFESSION
IN THIS COUNTRY.

A PROFESSION HE ADORNS BY HIS LEARNING
HIS UPRIGHTNESS AND HIS PUBLIC AND PRIVATE VIRTUES.

And also FROM THE DESIRE OF THE EDITORS

TO ASSOCIATE HIS NAME WITH THAT OF

THE GREAT INSTITUTIONAL WRITER

WHOSE WISDOM ILLUMINED NOT ONLY THE BRILLIANT AGE OF

THE ANTONINES

BUT ALTHOUGH LONG LOST TO HUMAN OBSERVATION

EXERTED A PERMANENT INFLUENCE UPON

THE JURISPRUDENCE

OF EVERY SUCCEEDING AGE.

P R E F A C E.

THE publication of this Edition of Gaius has been undertaken in deference to the expressed desire of many professional friends, and from a conviction that a translation of this, the earliest extant Institutional Treatise, would be both useful to students of the Roman law and acceptable to all interested in the advancement of the science of jurisprudence. The general plan of these Commentaries was adopted by Justinian in his Institutes, and has thus become the basis of nearly all subsequent systematic works on general law. To the student of classical literature these Commentaries are valuable as presenting a system of law which very closely resembles that which prevailed at Rome in the Augustan age; thus throwing considerable light on the legal allusions found in the great writers of that period.

The text adopted in this edition mainly agrees with that given by Gneist in the "*Institutionum et Regularum Juris Romani Syntagma*, Lips., 1858," with which the Editors have carefully collated the text of the Commentaries, as found in the editions of Lachmann, Berlin, 1842; Böcking, Lips., 1855; Domenget, Paris, 1866; and Huschke in his "*Jurisprud.*

Ante-Justin., Lips., 1867." The italics in the text denote that the portions thus printed have been supplied to fill up lacunæ in the MS.; the longer and more important ones having been restored, for the most part, from the Institutes of Justinian.

The difficulty of translating a writer so concise in his style as Gaius has been greatly enhanced by the imperfections of the text. A few sections were so incomplete as to admit of only the most remote conjecture as to their meaning, and have therefore been left untranslated. Although the Editors have availed themselves of the researches of the most recent German, French and Italian writers, they are obliged to confess that they do not regard this portion of their work with perfect satisfaction.

For above fifty years the text of Gaius has been in the hands of our jurists; but whilst the importance and value of the Treatise have been acknowledged on all hands, no English version has been hitherto published. This has no doubt arisen partly from the incompleteness of the text, but chiefly from the difficulty of finding at all times suitable phrases in which to present accurately the thoughts of the great Roman jurist. The Editors can therefore hardly expect that they have been in every instance successful in conveying the exact import of every obscure passage; but they are conscious of having bestowed upon this portion of their work a considerable amount of labour in the intervals of numerous professional duties, and of having earnestly striven to educe the writer's meaning.

The design of the annotations being mainly to explain the text of Gaius, the Editors have refrained from discussing questions of Comparative Law, and have, so far as practicable, avoided the introduction of technical English law terms, regarding such for the most part as more likely to mislead than to benefit the student. For the same reason, they have preferred to retain, rather than to translate, some of the more purely technical Roman legal words and phrases, giving in the notes such explanations as seemed to them required. In order to save the time of the student, the passages of the Digest and Code referred to have been quoted *in extenso*, whenever from the importance of the subject it appeared desirable that the *ipsissima verba* should be placed before the reader.

In the preparation of the annotations much valuable help has been obtained from researches made, and memoranda accumulated, during a prolonged course of study of the Roman Law at the University of Heidelberg and in the Jurisprudence Classes of the Inns of Court. In addition to the authors quoted and referred to in the notes, the Editors acknowledge their obligations to Professors Von Vangerow, Goldschmidt, Pagenstecher, and Vering, of Heidelberg; to Drs. Maine and Sharpe, Readers on Roman Law at the Inns of Court, and especially to George Long, Esq., M.A., late Fellow of Trinity College, Cambridge, who, as the friend and former tutor of one of the Translators, first directed his attention to this invaluable Institutional Treatise. The Editors would also acknowledge the kind assistance

rendered to them by William Garvie, Esq., B.A., of Lincoln's Inn, Barrister-at-Law, in the revision of the sheets as they passed through the press.

Notwithstanding the great care bestowed upon the preparation of the work, some typographical errors have crept in. The table of errata will, it is believed, enable the student to correct the most important of these.

LINCOLN'S INN,

October 30th, 1869.

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SOME ACCOUNT
OF THE
LIFE AND COMMENTARIES OF GAIUS.

IN presenting to the public, for the first time in an English dress, the Commentaries of Gaius on the Roman Law, it seems desirable to give some account of the great Roman Jurist, and of the discovery of the work we are now about to translate. The materials however for this purpose are but scanty. Gaius was the contemporary of Pomponius, and flourished after Julianus, of whom it is said "*edictum perpetuum composuit.*" (a) There are several points in relation to Gaius and his writings that remain as unsolved and difficult problems for the Jurist.

I. Even in regard to the spelling of his *Spelling of* name there has been not a little doubt; whether *his name.* it should be spelt with an i or a j, and whether the initial letter should be a C or a G, are disputed points; indeed, the letters of his name have furnished as fruitful a subject of controversy as the orthography of our own Shakespeare or Shakspeare. Some have chosen to write Caius instead of Gaius, and in favour of this spelling quote Quintilian. "Quid ?

(a) Eutropius, 8, 9.

quæ scribuntur aliter quam enuntiantur? Nam et Gaius C litera notatum, quæ inversa (,) mulierem significat.” The critics understand this passage to mean that the word which is spelt with a C is pronounced with a G, but Quintilian seems here to be speaking of *notæ*, and the true meaning may be that the word, when written properly, is Gaius, and is pronounced as it is written, but is sometimes designated shortly by the *nota* C, a letter different from the initial one. Caius seems to have been the original spelling, used at a time when the letter C, which occupies in the Roman alphabet the place of Gamma in the Greek, had, at least in some cases, the power of that letter. Caius was always pronounced Gaius, probably from the tendency of the organs of speech to pronounce Cai like Gai, and was written in Greek Γάιος, while the C in other words was represented in Greek by a K. It was in the beginning of the sixth century of the city that the letter G was introduced into the Roman alphabet by Spurius Carvilius, (*b*) and thenceforward the difference of pronunciation began to be indicated by a difference of notation.

Probably at the time when Gaius lived, and certainly in the time of Justinian, his name was generally spelt as pronounced, with a G, although the initial *nota* C still continued in use. The most valuable and trustworthy MS. of the Digest, known as the Codex Florentinus, has been consulted by critics, and it is found that in this codex the prænomen Gaius is always spelt with a G. This authority is not only the most trustworthy, but it is proved both by the vellum and the

(*b*) Plut. Prob. Rom., 54.

writing to date back as far as the seventh century, A.D. (c)

In early times the name was trisyllabic, like the Greek Γάϊος, but in times of less pure Latinity it was pronounced as a dissyllable. Boecking, after careful research and deliberation, and also Lachmann, both of whom are great authorities, decide for i and G, and for three syllables, not two. Boecking says, "*Gaii nomen trisyllabum est*," and he adds, "*neque C, sed G prima nominis littera est, ut lapides bonique codices scripti idemque ipse Quintiliani locus*," &c. Again, in his recent work on the Institutes he says, "Gaius, not Gajus, nor Caius, nor Cajus." (d)

The word Gaius had a meaning in ancient Latin, as in modern Tuscan, equivalent to the English *Gay*, and was connected etymologically with the Greek word Γάϊω.

II. On the questions when and where did

When and where did he live.

Gaius live, there has been a variety of opinions, and the subject may be regarded as still open to dispute. It has been asserted by some, that he flourished only 100 years before Justinian, in the 5th century of our era. A more recent and better opinion is, that he is to be regarded as one of the classical jurists. Hugo, a learned writer on the history of the Roman law, thought that he was a contemporary of Ulpian and Paulus, that he flourished under Severus, and also under Caracalla,

(c) See Diet. of Greek and Rom. Biog. under Gaius. *Law Review*, No. xl., 1865, p. 258; Ditto, No. xxxix., 1865, p. 14; the two last articles by the present writer. Schneider *Elementarlehre der Lateinischen Sprache*, i. l. p. 233.

(d) *Præfatio Gaii Inst. in notæ v*, p. 5. *Abriss der Instit*, p. 7. (b)

i.e., between A.D. 193 and 217. Great however as is the authority of Hugo, we cannot admit his conjecture to be correct. Gaius often mentions Hadrian in his Commentaries, and always, except in two passages, with the appellation of *divus*. In the two passages referred to he takes notice of *senatus-consulta* made *ex auctoritate Hadriani* (*c*). Hadrian died 138 A.D., and was succeeded by Antoninus Pius, who reigned till 161 A.D.

It is now generally believed that Gaius flourished and wrote his Institutes during the reigns of Antoninus Pius and M. Aurelius Antoninus Philosophus, whom the Romans are accustomed to cite simply as Marcus. Marcus reigned with Lucius Verus, from A.D. 161 till 169, and alone after that period till 176 A.D. In the year 176 he made his son, Commodus, his colleague, and reigned with him till 180 A.D. It is to the two princes, Marcus and Verus, that the Roman jurists apply the expression *divi fratres*. These were the palmy days of the empire, when literature, science and law were eagerly studied, and the severe doctrines of Zeno prevailed at Rome. It is of this age that Gibbon says, "If a man were called to fix the period in the history of the world during which the condition of the human race was most happy and prosperous, he would without hesitation name that which elapsed from the death of Domitian to the accession of Commodus. The vast extent of the Roman empire was governed by absolute power, under the guidance of virtue and wisdom. The armies were re-

(*c*) Gai. i. sec. 47, II. sec. 57. See also for *Diem Hadrianum*, l. 7 (*de rebus pub.*) D. 35. 5.

strained by the firm but gentle hand of four successive emperors, whose characters and authority commanded involuntary respect. The forms of the civil administration were carefully preserved by Nerva, Trajan, Hadrian, and the Antonines, who delighted in the image of Liberty and were pleased with considering themselves as the accountable ministers of the laws. Such princes deserved the honour of restoring the Republic, had the Romans of their day been capable of enjoying a rational freedom." (*ee*) It was during this epoch, one so favourable to literature, that our great Commentator wrote his Institutional Treatise.

To fix the exact date it is argued, that if we turn to his first commentary we find he mentions Antoninus Pius as though he were still alive. Gaius says:—"nam ex constitutione sacratissimi imperatoris Antonini." (*f*) Again: "nunc ex epistula optimi imperatoris Antonini quam scripsit pontificibus." (*g*) These passages contain nothing in them to lead to the supposition that Antoninus was dead, indeed it is thought by Von Vangerow that the tone of the extracts would seem plainly to indicate that he was still living. It is however objected to this, that the mention of Antoninus without the epithet *Divus* may possibly have no deeper meaning than the similar mention of Hadrian in the same book, (*h*) and again in the second book of his commentaries; that it would be rash to assert that we possess the Institutes of Gaius precisely as they proceeded from his hand; and that the very passage in the first commentary where Antoninus is spo-

(*ee*) Vol. I. c. i. p. 48. Ed. 1825.

(*f*) Gai. i. sec. 53.

(*g*) Gai. i. sec. 102.

(*h*) Gai. i. sec. 47. ii. sec. 57.

ken of as a living emperor with the epithet *sacratissimus*, is cited in the Digest, (i) and that there we read, "ex constitutione *Divi Antonini*." (j) It should however be remembered that there is another reading for *Divi*, namely *Pii*. Again, to support the opinion that Gaius wrote under the Antonines, attention has been directed to certain passages in his second commentary, where he says, "*sed nuper imperator Antoninus significavit rescribo*:" (k) and a little further on in the same book he expresses more plainly that Antoninus was dead, for he says, "*sed hodie ex divi Pii Antonini, &c.*" (l) This, it is argued, is sufficient evidence that he wrote not only after the reign of Hadrian, but during that of Antoninus Pius, and after the decease of this last-named emperor.

It is certainly now the general opinion, at least in Germany, where much time has been spent upon the investigation, that Gaius was born under Hadrian, but that he lived and wrote during the reigns of Antoninus Pius and his immediate successors. It seems also pretty clear that the great commentator had published his Institutes before the decease of Marcus, for Ulpian, in his *Fragmenta*, informs us of a *Constitutio Divi Marci* on the doctrine of *cretio*, which constitution, with the alterations it contains, is not introduced by Gaius into his Institutes. "*Cretio est certorum dierum spatium, quod datur instituto heredi ad deliberandum, utrum expediat ei adire hereditatem nec ne.*" (m) The passage referred to in Ulpian speaks of the institution

(i) L. 1. sec. 2 (do his qui, &c.) D. 1. 6.

(j) See Art. Gaius Dict. of Greek and Rom. Antiq. vol. 2. 198.

(k) Gai. ii. sec. 126. (l) Gai. ii. sec. 195. (m) Ulp. Frag. xxii. sec. 27.

of the heir under an imperfect *cretio*. It is as follows :
 “ Si sub imperfecta cretione heres institutus sit, id est non adjectis his verbis. SI NON CREVERIS, EXHERES ESTO, sed si ita, SI NON CREVERIS, TUNC MAEVIUS HERES ESTO, cernendo quidem superior inferiorem excludit ; non cernendo autem, sed pro herede gerendo in partem admittit substitutum : ” and then Ulpian adds, “ *sed postea divus Marcus constituit, ut et pro herede gerendo ex asse fiat heres. Quod si neque creverit, neque pro herede gesserit, ipse excluditur, et substitutus ex asse fit heres.* ”

(n) It is scarcely to be conceived as possible that Gaius could have been ignorant of this alteration in the law, if he had written his commentaries subsequent to this constitution of Marcus. In like manner it has been observed, that the statements made by Gaius as to certain hardships in the law of succession, which required the correction of the prætor's edict, could scarcely have been written after the senatus-consultum Tertullianum, made in the reign of Antoninus Pius, A.D. 158, (D. 38. 17) and still less after the senatus-consultum Orphitianum, made in the reign of Marcus and Commodus, A.D. 178. (o)

From the above remarks the student of history will feel, we imagine, but little difficulty in coming to the conclusion that the age of Gaius is that which we have already indicated.

III. The origin, the training and the exact professional position occupied by this great master of the law among his distinguished compeers are shrouded in the mists of a

*His position
among the Ro-
man Jurists.*

(n) Ulp. Frag. xxii. sec. 34.

(o) Compare Inst. III. tit. 4. pr. and Capitolinus, in Marco 11.

remote antiquity. We would gladly lift the veil that conceals from our view the home and the position of a man who wrought at the very fountain-head of Jurisprudence. Upon these points all is hidden. One unsolved riddle in connection with Gaius is, that whilst he is certainly to be classed with the most distinguished Roman jurists, it is a striking fact that no later jurist ever mentions his name. This, indeed, is the more remarkable, since a number of inferior men are referred to, and extensive quotations given from their writings. Frequent mention, for instance, is made of Cassius, of Julianus, of Ulpianus, of Paulus, and of many others. But of Gaius not a word is uttered by any subsequent writer. We cannot entertain even a momentary doubt as to the high position he occupied among the jurists of his time. The following facts prove his standing. His writings and those of four other jurists, were recognized as authoritative by the so-called "Citation-Law" of Valentinian III. By a law of Theodosius II. and Valentinian III., passed in the year 426 A.D., he was installed with Papinianus, Paulus, Ulpianus, and Modestinus, as forming a *collegium*. The words of the law are, "Papiniani, Pauli, *Gaii*, Ulpiani atque Modestini scripta universa firmamus ita, ut Gaium quæ Paulum, Ulpianum et cunctos comitetur, auctoritas lectionesque, ex omni ejus opere recitentur, etc." (p) Again, for centuries the Institutes of Gaius were placed in the hands of the students of the Roman law in their first year's course. They were also epitomized and received into the West Gothic Code.

(p) See Puchta's Institutionen, vol. I. pp. 659 et seq.

Moreover, numerous extracts from his other writings are found among the body of excerpts contained in the Pandects. What prevented his being quoted and referred to by name? If Gaius had been a later Jurist, or if he had been a writer of no importance it would be easy to reply. But he was the very coryphæus of the Roman Law, which renders this silence in regard to him almost inexplicable. Was it because he was a provincial jurist, and did not live in Rome, that he had not the *jus respondendi*, that he was not to be classed with those "*quibus permissum est jura condere*? Would it have been a breach of etiquette for a Roman lawyer to have quoted the "*sententie et opiniones*" of one who was regarded as only a writer of text-books, a private teacher of the law, and not one of the great authorities entitled to expound legal doctrines? The only probable explanation is, that Gaius was rather a teacher of the law, than a practical jurist whose opinions derived authority from imperial sanction. The jurists who were armed with that *jus respondendi* which was first bestowed by Augustus, partook of the emperor's prerogative, and their *responsa*, their solemn legal decisions had a force independent of their intrinsic reasonableness, and vastly superior to the best considered opinions of an unprivileged lawyer. (q) The above are conjectures which may point to a probable explanation. The fact, however, of this silence of other jurists respecting Gaius is so remarkable that it was impossible wholly to ignore it.

The position occupied by Gaius and

IV. Having as far as possible defined the period at which Gaius

(q) See Art. Gaius, Dict. Gr. and Rom. Biog.

the School of Jurists to which he belonged. flourished, which, as we have seen, was a little later than Salvius Julianus, it is to be observed that this was a critical period in the development of Roman jurisprudence. The prætors, in a long and noble succession, proceeding upon the *universal element* contained in the *jus gentium*, had evolved the most complete body of law that any nation had ever possessed. These great luminaries of the law, having risen and passed the meridian, upon the embodiment of their labours by Julianus, sank for ever to rest beneath the horizon. The importance and authority of this great work of Julianus may be estimated from the following statement, that "Diocletianus et Maximianus Imperatores illud JUS PERPETUUM adpellare non dubitant." (*r*) Before the time of Gaius, the great jurists had been principally engaged in commenting upon the "*Leges duodecim tabularum*" and in the invention of *formule*. Upon the completion and codification of the edict a new epoch arose in the history of the jurisprudence of Rome. The Law had attained to that *fixedness*, its *normæ* and rules were so defined, that it then became possible, in a synthetic manner and institutionally, to expound its broad fundamental principles. This is the work that Gaius has achieved in his *Commentaries*. His book was the model for the *Institutional Treatise* of Justinian, published after the lapse of about two hundred years. Indeed, his *Institutes* have served in many respects as a plan for all institutional legal treatises written since his time. Thus the "*Institutiones juris Canonici*," a Joan. Paulo Lancel-

(*r*) Eutropius, 8. 9. Heineccii Antiq. Rom. Præm. sec. 14.

lotto, the treatise written for elementary instruction in the Canon Law is cast in the very mould formed by the Institutes of Gaius. It consists of four books. The first commences—"De jure Canonico." The second has for its commencement "De rerum divisione, atque illarum administratione." The third is not so marked in its resemblance to that of Gaius, its initial title is—"De judiciis, et illorum divisione." The fourth book, however, clearly resembles that of Gaius in which he treats of the Actio, it commences—"De Accusationibus Denunciationibus et Inquisitionibus."

At the time when Gaius wrote there were two sects or schools of jurists at Rome. These sects had existed for a long period, having arisen as early as the time of Augustus. Before the reign of this emperor, although diversities of opinion had existed, there were no distinct schools among the Roman jurists. In the reign of the emperor just mentioned two great jurists flourished—ANTISTHIUS LABEO, a pupil of Trebatius and a son of Quintus, himself a jurist who had accompanied Brutus and Cassius to the battle of Philippi and who after the wreck of freedom would not survive the republic, (s) and CAIUS ATEIUS CAPITO, a scholar of Ofilius. These men were the founders of the two great schools of Roman lawyers. Pomponius says:—"hi duo primum veluti diversas sectas fecerunt." These two great ornaments of the law were doubtless influenced, to a certain degree, by the political circumstances of the times. Antisthius Labeo, being a staunch friend to the republic, was opposed to the ambition of August-

(s) Zimmern Rechts Geschichte, 204, note 20.

tus, and spurned his offers of conciliation. (*t*) He was not only a great lawyer but also a profound philosopher. Pomponius briefly states the peculiarities of the founders of the two schools. "Nam Ateius Capito in his, *quæ ei tradita fuerant, perseverabat*; Labeo ingenii qualitate et fiducia doctrinæ, qui et ceteris operis sapientiæ operam dederat *plurima innovare instituit*." (*u*) An interesting portrait is given of Labeo, drawn by his opponent Capito and preserved by A. Gellius. (*v*) Capito in his political bias was the very opposite of Labeo, and it is owing to this circumstance that there was such a diversity in the opinions of the two sects. Capito, as we should express it kept to "the letter of the law:" whilst Labeo with greater freedom and with less restraint deduced his arguments from the very nature and essence of things. (*w*)

Both of these men gathered around them a troop of *auditores*, some of whom proved to be men of the greatest ability, and rose to the highest distinction in the state. The school of Capito was named not after its real founder, but after his disciple M. Sabinus, and hence arose the name Sabinian. "Et ita Ateio Capitoni *Massurius Sabinus successit* . . . Massurius Sabinus in equestri ordine fuit, et publice primus respondit." (*x*) The doctrines of Labeo were defended by Nerva, who was succeeded by Proculus, from whom the school of Labeo was afterwards named. Pomponius

(*t*) Appian de Cell. civ. IV. 135; Puchta's Inst. vol. I. 445; Tac. Ann. iii. 65.

(*u*) L. 2. sec. 47, de orig. jur. D. 1. 2.

(*v*) A. Gellius' Noc. Att. xiii. c. 10. 12.

(*w*) Marezoll Inst. p. 67; A. Gellius xiii. c. 10. x. c. 20; Tac. Ann. iii. c. 70. Macrobian Sat. 7. 13.

(*x*) L. 47, de origine juris, D. 1. 2.

says, "*Labeoni Nerva* (successit) adhuc eas *discussiones auxerunt Nerva successit Proculus.*" (y) The two schools of jurists lasted for nearly two hundred years, the Sabinian school still clinging to the letter of the law, to the objective external proof, and exhibiting great acuteness in its discussions and criticism; the Proculian school using greater freedom and deriving its arguments more from the principles, the appropriateness, and the fitness of the law, than from any other consideration.

There were great men in both the schools. To the Proculian school belonged not only Nerva the father, but a son of the same name. "Fuit eodem tempore Nerva filius," who became distinguished at the early age of seventeen years, at which age he is said to have made legal responses. (z) To the same school belonged Pegasus, Celsus, both father and son, and Neratius Priscus, whose fragments are the very gems of the *Pandects*. To the Sabinian school belonged Sabinus, from whom it received its name, Caius Cassius Longinus, Cælius Sabinus, Priscus Javolenus, Aburnus, Valens, Tuscianus, and Salvius Julianus, the great jurist who compiled the *Edict*. It will be observed that in the above enumeration the name of Gaius does not appear. For this two reasons may be assigned. One is, that Pomponius, from whom we derive the catalogue, wrote in the time of Hadrian, which was before the period when Gaius flourished; and another probable reason is, as we have already said, that Gaius did not reside in Rome; he was only a provincial jurist. Belonging

(y) L. 47, de origine juris, D. 1. 2.

(z) L. 2, sec. 47, id. l. 1, sec. 3, de postul. D. 3. 1.

to the Sabinian school of lawyers, as he has affirmed, he was one who followed the strict letter of the law. When speaking of this school he uses the phrase, "*nostri præceptores*," whilst when speaking of the jurists of the Proculian school he uses the expression, "*diversæ scholæ auctores*." (a)

After the time of Antoninus Pius, the distinctions between the schools lost their importance, and the brilliant men of the succeeding age belonged to neither of the schools. Such was the case with Papinianus, Paulus, and Ulpian, who flourished in the time of Severus. These great men were attached to neither of the sects, and the result was that the school controversies of the former age so keenly maintained, and originating at least partly in a political cause, ceased to be of importance.

V. The discovery of the Institutes of Gaius, at Verona, in the year 1816, was an event which every student of the Roman law hailed with delight. It was the rescue from oblivion of the greatest literary treasure of the present century. It has thrown light upon many dark points of the more ancient laws of Rome. The fourth book of the commentaries has in many respects modified the views formerly held on Roman civil process, while some passages in the Pandects previously unexplained, and indeed inexplicable, are now rendered perfectly clear by the discovery of the Commentaries of Gaius.

In the middle ages, before the discovery of printing,

(a) See especially on the distinction of the sects, Dirksen, "Beiträge zur Kunde des Röm. Rechts; Abtheilung I."

when books were written upon parchment it was the practice to remove the writing from old MSS., and even to bleach them in the sun, in order to pen upon the renovated surface a new work. When washing alone would not expunge the writing, as often happened in the case of MSS. written on the once hairy side of the skin, mechanical means, even scraping, were employed to erase the characters. The works of a Father were sometimes made to cover pages which had contained before the works of some profane dramatist. Not unfrequently the parchment was a second time submitted to the same treatment. The Father who had supplanted the dramatist was himself in turn obliterated, in order to give place to some scholastic doctor. The MS. of Gaius had been submitted, probably by some monk unacquainted with its value and importance, to this mode of treatment. Those sentences so full of interest and instruction had been blotted out by writing directly over them matter of little interest compared with the great work which had been unfortunately destroyed. We cannot do better than give the words of Mr. Greaves, used in the account he presents in his interesting and valuable article on Gaius already referred to.

“In the library of the Chapter at Verona is a codex numbered XV., but now XIII., containing a manuscript of St. Jerome, written over an older manuscript. Nearly one-fourth part of the manuscript was *bis rescriptus*, and where this was the case, it seems that St. Jerome had also been the second occupant. The manuscript first written on the parchment consisted of 251 pages, and each page of 24 lines. One leaf, or two pages, 235 and 236, concerning Prescriptions and In-

terdicts, had been detached from the rest of the manuscript and escaped being overlaid by St. Jerome. These two detached pages, together with four other pages, detached from some other codex, and containing the fragment of an uncertain author, *De Jure Fiscī*, had been found in the library of Verona before the year 1732, by the celebrated Scipio Maffei. He describes them in his '*Verona Illustrata*,' parte terza, c. 7. p. 464, (fol. Verona, 1732). In his '*Istoria Teologica*' (fol. Trento, 1742), the greater part of both fragments was first published, and in plate X. a fac-simile was given of part of the writing of the fragment *De Interdictis*. From the '*Istoria Teologica*' part of this fac-simile was copied and republished, not very accurately, in the '*Nouveau Traite de Diplomatique*,' vol. iii., p. 208, tab. 46 (Paris, 1757)."

Maffei had not failed to notice a correspondence between the fragment *De Interdictis* and the 15th title of the fourth Book of Justinian's Institutes; but instead of recognizing Gaius, whose text was the basis of Justinian's work, he supposed that the leaf he had found was part of an interpretation or compendium of Justinian's Institutes, made by some later jurist. To Maffei, however, belongs the credit of having first given to the world two pages of the manuscript of the genuine Gaius. Maffei had observed that the manuscript of the letters of Jerome was a *codex rescriptus*; but he was not aware of the connection between that manuscript and the detached leaf to which his attention had been previously so carefully directed. Three-quarters of a century had passed away when Haubold, a distinguished German jurist, directed attention to the fragment concerning Interdicts published so long be-

fore by Maffei. He prepared and published an essay at Leipzig, in 1816, under the title of *Notitia Fragmenti Veronensis, de Interdictis*. (b)

Whilst this essay was preparing, in the same year but before its publication the great Niebuhr was despatched to Rome by the King of Prussia, as minister to the Apostolic See. Mr. Greaves, shall relate the rest.

“On his way, he spent the greater part of two days in examining the cathedral library of Verona, and made wonderfully good use of his limited time. Besides copying the manuscript of the fragment, ‘de Jure Fisci,’ he copied fully and accurately the fragment concerning Interdicts and Prescriptions, and did not hesitate to ascribe the latter fragment to its real author, Gaius. He proceeded to examine Codex XIII., and by means of an infusion of nutgalls was able to decipher the 97th leaf of the obliterated writing, which he at once recognized as an important work of a most ancient jurist, whom he had at first supposed to be Ulpian. The fruits of his researches he communicated by letter to Savigny, by whom they were printed in the third volume of the *Zeitschrift*; Savigny added a learned and acute commentary of his own, and put forward the felicitous conjecture, amply verified in the sequel, that the ancient text of codex XIII, contained the genuine Institutes of Gaius, and that the fragment concerning Prescriptions and Interdicts had formerly been a part of the codex.”

In the month of May, 1817, the Royal Academy of Berlin commissioned Goeschen and Bekker to proceed

(b) Maff. Opuscula, vol. II. p. 327-346.

to Verona, with instructions to decipher the ancient MS. Bekker's place was afterwards filled by that able jurist, Bethmann Hollweg. These two Germans devoted themselves with the utmost assiduity to the difficult task allotted them. The MS., in the opinion of the palæographer Kopp, (c) must be dated earlier than the legal reforms of Justinian. The condition of the MS. and the character of the original writing greatly augmented the labour of the transcribers. Like the drafts of legal documents of the present day, it was full of intricate abbreviations and signs used for the sake of contraction. These had been employed probably to economize the parchment, which is supposed to have been in former times both scarce and valuable. But these were not the only difficulties. There were very few pages where the manuscript had not been entirely written over, and in more than sixty pages it was *bis rescriptus*.

Such was the condition of this invaluable repertory of the Roman Law. No doubt the profound acquaintance that the transcribers had with the subject of the manuscript, the extracts in the Digest, the West Gothic code, and Justinian's Institutes, greatly aided them; but we can imagine these German jurists, weary with deciphering, pacing in solicitude the old square in the vicinity of the Chapter Library at Verona, considering the best means of surmounting the many difficulties presented at the close of each day's work.

Such success, however, crowned their industry, that by far the greater part of the Institutes of Gaius was restored. As might have been conjectured, the pages

(c) Savigny's Zeitschrift, vol. iv., p. 75.

had been deranged, and three leaves are missing. These are the leaves following, pp. 80, 126, and 194. The argument of the first missing leaf may be collected from the West Gothic *Epitome*, and the contents of the second missing leaf have been preserved in an ancient extract, made by the author of the *Collatio Rom. et Mos.* The 195th leaf is still wanting, and Boecking, to the regret of all readers of this valuable commentary, is obliged to write opposite the annoying gap, "*Fol. deperditum.*" Goeschen says, in regard to this last page, "*Folium quod hanc olim excipiebat paginam deperditum esse constat. Cujus folii argumentum triplex fuisse mihi persuadeo: tractatus de sacramenti actione continuatio et finis; deinde actionis quæ per judicis postulationem fieri dicebatur descriptio; denique illius articuli in quo condictionis indolem Gaius noster exposuit pars prior: posteriorem exhibet pag. xevi. b.*"

The first printed sheet of Gaius appeared in the year 1819, and in 1821 the first complete edition of the work was published by Goeschen. Its publication aroused the greatest interest on the continent and was regarded as constituting an epoch in the study of Roman law. "The authority of the discovered institutes," says Mr. Greaves, "was beyond dispute. "This was clear, from internal evidences, which would prove a forger to have possessed miraculous knowledge and sagacity. The work was found to agree with the Institutes of Justinian, which were derived from it. It was the manifest source of the Gothic epitome. It contained all the passages cited from the Institutes of Gaius in the Digest, in the Collatio by Boethius (Ad. Cic. Topica, iii. 5. sub. fin.)"

The Institutes of Gaius was not his only work; he wrote a commentary on the Twelve Tables, one on the Lex Julia et Papia, on the Ædilitian and Provincial Edicts; also some Monographs, and lastly Libri VII rerum quotidianarum sive Aureorum. From the last we have extracts in the Pandects, but only out of the first three books. The Digest contains no less than 535 excerpts from Gaius.

It will be observed that among his manifold writings we find no *responsa*, no *questiones*, but though he wrote a book, "*de casibus*," in which remarkable legal cases are collected, none of these appear to have been decided by himself, and some are feigned. This seems to confirm the view taken above, that he did not possess the *jus respondendi*, and to support the conjecture that he was probably at the head of some private provincial school for teaching the law. It is unnecessary to go into an analysis of his work now before us, as the tables to be printed at the end of this translation will sufficiently explain the contents, and subdivisions of the four books of the Commentaries.

COMMENTARIES

OF

GAIUS.

COMMENTARY THE FIRST.

DE JURE GENTIUM ET CIVILI.

1. *Omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum jure utuntur: nam quod quisque populus ipse sibi jus constituit, id ipsius proprium est vocaturque jus civile, quasi jus proprium ipsius civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peræque custoditur vocaturque jus gentium, quasi quo jure omnes gentes utantur. Populus itaque Romanus partim suo proprio, partim communi omnium hominum jure utitur. Quæ singula qualia sint, suis locis proponemus.*

ON THE LAW OF NATIONS AND THE CIVIL LAW. (a)

1. All nations who are governed by laws and customs observe partly their own particular law and partly the law common to all mankind. For that law which any nation establishes for itself is its own proper law, and is called *jus civile*, being the peculiar law of that state; but that which natural reason establishes among mankind generally is uniformly observed by all people, and is called *jus gentium*, as that law which all nations observe. Thus, the Roman people use partly their own peculiar law, partly that law which is common to all men; each of which we will treat of in its proper place.

JUST. i. 1. 2.

(a) The various compendia of the Roman law which have come down to us, with the exception of the Codex, commence similarly to the Commentaries of Gaius. Such is the case with the Pandects and the Institutes of Justinian. The Codex, however, does not commence with the title *de*

justitia et jure, its first title "*de summa Trinitate et fide catholica*." (See Gans, p. 1. 2, note iii.) Gaius, it will be observed, does not refer to the *jus naturale*, a term often used by Ulpian. The so-called *jus naturale* is only so named by analogy, and has no active operation in the sphere of Roman law. (Inst. Rom. L. p. 14.) When we first become historically acquainted with man, we find him in the state or condition which we term Society, and under the patriarchal power. The definition given by Ulpian of *jus naturale*, 1, de just. et jure, D. 1. 1., which has been followed by Warnkoenig and others, is calculated to mislead. It is singular that almost all writers have spoken of society as being originally under a species of *jus naturale*.

The *jus gentium* was strictly a Roman idea, and however much contempt may have been originally felt for the set of principles it included, these principles became at a later period intimately commingled with the *jus civile*, or municipal law, which, though not absolutely extinguished, was in a very great degree modified by their introduction. The conception of *jus naturale* arose from a combination of Roman and Greek ideas. The old Ionic philosophy resolved everything into a simple element or law. The universe as thus resolvable was nature, and this state of nature was supposed to be capable of being reduced to *simplicity, symmetry and harmony*. The Romans chiefly valued the *jus gentium* for its supposed accordance with this law of nature. The order in which these ideas were propounded by the Romans was the following:—first came the *jus naturale*; second, the *jus gentium*; and lastly, the *jus civile*. This historically inverts their true order. First should come the *jus civile*, then the *jus gentium*, and finally, the *jus naturale*. Law and politics have been in modern times immensely influenced by this theory of the Roman jurists. For example, in France the doctrine of the law of nature played a most important part. The French lawyers and the French politicians believed in the dogma contained in the term, "a state of nature." This was Rousseau's theory, and was predominant in the minds

of those who guided and led the first French Revolution. The great error into which the encyclopedists and writers of the period referred to fell was, that they confounded the so-called law of nature with *moral law*, and by so doing entirely jeopardised the latter. The favourite phrase with French professors now is "*obligatory law*." This so-called natural law must not be confounded with moral law, or the law of conscience.

2. Constant autem jura ex legibus, plebiscitis, senatusconsultis, constitutionibus Principum, edictis eorum qui jus edicendi habent, responsis prudentium.

2. Legal precepts (b) arise from leges, plebiscita, senatus-consulta, the constitutions of the emperors, the edicts of those who have the jus edicendi, (c) and from the answers of the juris-consults. (d)

JUST. I. 2. 3.

(b) *Jura*. This is rendered *legal precepts*, in preference to the word *rights*, as it does not appear that the Romans had at this time the abstract idea of Rights. The German word "*Rechtshschriften*," which Dr. Beckhaus gives in his translation, and which may be rendered legal precepts or forms seems well to express the meaning of the text. The organs from which legislation proceeded were not synchronous in their origin, but attained their greatest activity at different epochs. (Ins. Rom. Law, p. 18 et sqq., also p. 44.)

Jus is law including *lex*; *lex* resembles our statute law. It was the jurists of the middle ages who as schoolmen used the term *jus* in the sense of right.

(c) *Jus edicendi*. Vide infra, sec. 6.

(d) *Juris-consults*. Vide infra, sec. 7.

3. Lex est quod populus jubet atque constituit. Plebiscitum est quod plebs jubet atque constituit. Plebs autem a populo eo distat, quod populi appellatione universi cives significantur, connumeratis etiam patriciis; plebis autem appellatione sine patriciis ceteri cives significantur. Unde

3. A *lex*(e) is that which the populus decrees and establishes. A plebiscitum is that which the plebs decree and establish. But the plebs are distinguished from the people thus: by the term people is signified all the citizens (cives), including also the patricians, but by the term plebs is signified the

olim patricii dicebant plebiscitis se non teneri, quia sine auctoritate eorum facta essent. Sed postea lex Hortensia lata est, qua cautum est ut plebiscita universum populum tenerent. Itaque eo modo legibus exaequata sunt.

rest of the citizens, not including the patricians; hence, formerly the patricians were said not to be bound by the plebiscita, because these were made without their authority; but afterwards the lex Hortensia (*f*) was carried, by which it was provided that plebiscita should bind the whole people; thus in this manner the plebiscita obtained equal force with the (*leges*) laws.

JUST. i. 2. 4.

(*e*) A lex was originally passed by vote of the *populus in comitia curiata*. By the Servian constitution this power was transferred to the *comitia centuriata* except in some special cases; the plebiscita were adopted in the *comitia tributa*, the assembly of the plebs, and were proposed by the tribune of the plebs.

(*f*) The *lex Hortensia* was introduced by the Dictator Q. Hortensius in 466 A.U.C. The principle contained in this *lex* had been previously admitted by the passing of the *lex Valeria*, 304 A.U.C., and the *lex Publilia*, 414 A.U.C., by both of which it was provided that *plebiscita* should bind the *patres* as well as the *plebs*. The evasion of this law by the *patres* had probably rendered its repeated confirmation necessary, as in the case of our own Great Charter.

4. *Senatusconsultum* est quod senatus jubet atque constituit, idque legis vicem optinet, quamvis fuerit quaesitum.

4. *Senatus-consultum* (*g*) is that which the Senate decrees and appoints, and has the force of law, although this has been doubted.

JUST. i. 2. 5; D. i. 2. 2. 9.

(*g*) The *senatus-consulta* were a source of the *jus scriptum* as well as the *leges* and the *plebiscita*. This is mentioned expressly by Cicero in his "Topica." Cicero enumerates the organs of legislation as "*leges, senatus-consulta, res judicatae, juris peritorum auctoritas, edicta magistratum,*

mos, æquitas." It is also mentioned in the so-called "Tabula Heracleensis," which contain the *lex Julia municipalis*, passed in the early part of the eighth century of the state. Horace also, in his "Epistles," affirms the same: "Vir bonus est quis? Qui consulta patrum, qui leges juraque servat." (Hor. Epis. ad Quiritium, lib. I. 16. 44.) Hence, there can be no doubt, as Gaius observes, but that the *senatus-consulta* were *legibus exæquata sunt*."

It was in the interval between the second and third century of the empire that the senate exhibited its greatest activity. The *senatus-consulta* Trebellianum, Tertullianum, and Orphitianum were respectively enacted in the reigns of Nero, Hadrian, and Marcus Aurelius. Several others also were passed during this same period. Later we find the word "Oratio," a term applied to a written or verbal proposal made by the emperor to the senate, over the composition of a *senatus-consultum*: thus we find the expressions "Oratio Severi," "Oratio Caracallæ," and names of other emperors. These were not *senatus-consulta*, but they show the extent to which the monarch began to interfere with the legislation of the senate. The term "Oratio" indicates the gradually growing usurpation of the legislative power of the emperors. We find the expression "*senatus-consulta*" still in use in the time of Diocletian, but the senate possessed no legislative power; it was permitted to give its counsel to the prince, but its glory and its power were departed. The first two centuries of the emperors appear to have sufficed for its growth, its grandeur, and its decay. (Inst. Rom. L. 42 et sqq.)

5. *Constitutio Principis* est quod Imperator decreto vel edicto vel epistula constituit. Nec unquam dubitatum est, quin id legis vicem optineat, cum ipse Imperator per legem imperium accipiat.

5. A constitution of the princeps (*h*) is that which the emperor establishes either by decree or by edict, or by rescript, neither has it ever been doubted that this has the force of a law (*lex*), since the emperor himself receives the *imperium* by a law (*lex*). (*i*)

(h) In speaking of the constitutions of the emperors, Gaius mentions only the *decree*, the *edict*, and the *rescript*. To these must be added the *mandate*. The *mandata* were instructions given by the emperors to the imperial functionaries discharging duties abroad. In the provinces of *the people* there were the proconsuls and proprætors, who were magistrates of the *populus Romanus*; but in the imperial provinces were the *legati* and other great officers receiving their authority from the emperor. These officers of the princeps received from their imperial master rules for their guidance in certain-specified concrete cases; as for instance in the case of military testaments. When a new legal rule was laid down in a *mandatum* and the decree based upon it was published, it became binding in all other similar instances as a law.

(i) *Cum ipse Imperator per legem imperium accipiat.* This passage seems clearly to refer to the so-called *lex regia*, in relation to which there has been so much dispute. The *lex regia* was not passed once for all, but was enacted afresh for each succeeding emperor. That this view is correct will appear from the following facts. In the time of the ancient Roman *reges* their authority dated only from the period of the passing of the law which invested them with royal authority. It was the *lex* which made the *rex*. Again, in order to invest the magistrates with legislative power, subsequently to the period of the kings, there was invariably a *lex* passed in the *curia*, "*de imperio.*" Hence, it seems perfectly natural to conclude that a principle so deeply rooted in the Roman law would be continued in force as far as possible in the times of the emperors. The discovery of the treatise of Cicero entitled "*de republica*," has removed much doubt which had previously existed upon this subject. We have also a remarkable fragment relating to this *lex regia* preserved in the "*lex de imperio Vespasiani.*" a relic found in Rome in the fourteenth century and still preserved there. This ancient relic contains a *lex*, properly so called, and not a *senatus-consultum*, as it has

been erroneously supposed, in consequence of the passage in Tacitus in which he says "*eo senatus die, quo de imperio Vespasiani censebant.*" (Tacit. Hist. iv. 6.) This *lex* empowered Vespasian to conclude alliances, to originate *senatus-consulta*, to elevate persons to magisterial and senatorial rank, to put forward ordinances having the power of law, &c. (See Inst. Rom. Law, tit. iv. sec. 10:)

6. Jus autem edicendi habent magistratus populi Romani. Sed amplissimum jus est in edictis duorum Prætorum, urbani et peregrini: quorum in provinciis jurisdictionem Præsidēs earum habent; item in edictis Ædilium curulium, quorum jurisdictionem in provinciis populi Romani Quæstores habent; nam in provincias Cæsaris omnino Quæstores non mittuntur, et ob id hoc edictum in his provinciis non proponitur.

6. The magistrates of the Roman people have the *jus edicendi*, but this right is exercised most fully in the edicts of the two prætors, the prætor *urbanus* and the prætor *peregrinus*, (*j*) whose jurisdiction the governors have in their respective provinces: it is exercised also in the edicts of the curule ædiles, whose jurisdiction the quæstors have in the provinces of the Roman people; for the quæstors are certainly not sent into the provinces of Cæsar (*k*), and on that account the edict (*l*) is not promulgated in these provinces.

JUST. i. 2. 7; D. xxvii. 1. 1.

(*j*) The prætor *peregrinus* was appointed about the time of the first Punic war to decide in disputes between foreigners. In ancient times the word *peregrinus* was used as equivalent to *hostis*, but in the times of which we have historical records, a *peregrinus* was any person who was not a Roman citizen. Very early in the history of Rome, the attention of the government was attracted by the large immigration of foreigners on Roman soil. As the city grew, there was no preventing a large access of strangers, whilst every brawl occasioned by them endangered the state. A jurisdiction was established to settle disputes between a *civis* and a *stranger*, and the prætor *peregrinus* became the judge. The principles of law applied to such cases were derived from those of the *jus gentium* which were not repugnant to the *jus civile*.

Dr. Maine well observes that "in the early Roman

republic the principle of the absolute exclusion of foreigners pervaded the civil law no less than the constitution. The alien or denizen could have no share in any institution supposed to be coeval with the state. He could not have the benefit of quiritarian law. He could not be a party to the *nexum*, which was at once the conveyance and the contract of the primitive Romans. He could not sue by the sacramental action, a mode of litigation of which the origin mounts up to the very infancy of civilization. Still, neither the interest nor the security of Rome permitted him to be quite outlawed. All ancient communities ran the risk of being overthrown by a very slight disturbance of equilibrium, and the mere instinct of self-preservation would force the Romans to devise some method of adjusting the rights and duties of foreigners, who might otherwise—and this was a danger of real importance in the ancient world—have decided their controversies by armed strife. Moreover, at no period of Roman history was foreign trade entirely neglected. It was therefore probably half as a measure of policy and half in furtherance of commerce that jurisdiction was first assumed in disputes to which the parties were either foreigners or a native and a foreigner. The assumption of such a jurisdiction brought with it the immediate necessity of discovering some principles on which the questions to be adjudicated upon could be settled, and the principles applied to this object by the Roman lawyers, were eminently characteristic of the time. They refused, as I have said before, to decide the new cases by pure Roman civil law. They refused, no doubt because it seemed to involve some kind of degradation, to apply the law of the particular state from which the foreign litigant came. The expedient to which they resorted was that of selecting the rules of law common to Rome and to the different Italian communities in which the immigrants were born; in other words, they set themselves to form a system answering to the permissive and literal meaning of *jus gentium*, that is, law common to all nations. *Jus gentium* was, in fact, the sum of the common

ingredients in the customs of the old Italian tribes, for they were *all the nations* whom the Romans had the means of observing, and who sent successive swarms of immigrants to Roman soil." (Ancient Law, pp. 48, 49.)

(*k*) Augustus Cæsar divided the provinces between the senate and himself. He took charge of those provinces in which there was a disturbance or a necessity for the presence of troops. The reason for such a division probably was that he might have the army under his own control.

(*l*) *Et ob id hoc edictum*, &c. Gaius is here referring to the Ædiles. The Ædiles were minor magistrates, and derived their name from having the care of the temple (*ædes*) of Ceres. They were originally two in number, and their duties were ministerial. They had charge of the public lands, markets, slaves, &c. It was not till a late period that they had jurisdiction out of Rome.

7. *Responsa prudentium sunt sententiæ et opiniones eorum quibus permissum est jura condere. Quorum omnium si in unum sententiæ concurrant, id quod ita sentiunt legis vicem optinet; si vero dissentiant, iudici licet quam velit sententiam sequi: idque rescripto divi Hadriani significatur.*

7. The answers of the juris-consults are the decisions and opinions of those to whom it is permitted to determine questions of law. If the whole of them concur in one opinion, that in which they thus agree has the binding force of a law (*lex*), but if they do not agree, the judge is at liberty to follow any one opinion according to his own judgment; this is determined in a rescript of the Emperor Hadrian. (*m*)

JUST. i. 2. 8.

(*m*) The *responsa prudentium* first acquired importance in the time of Augustus. "*Primus divus Augustus, ut major auctoritas haberetur constituit ut ex auctoritate ejus responderent.*" (l. 2, sec. 47, Dig. de Orig. Jur.) It was not however till the reign of Hadrian that these decisions obtained *legis vicem*—the binding force of law. (See Hugo Rechtsgesch., 2nd ed. sec. 812; Savigny's System I. sec. 26. note *b. s.* 156; Puchta, Instit. I. sec. 117. 5th ed. p. 582.)

Dr. Maine calls these responses the “answers of the learned in the law,” and says that the form of these responses varied a good deal at different periods of the Roman jurisprudence, but throughout its whole course they consisted of explanatory glosses on authoritative written documents, and at first they were exclusively collections of opinions interpretative of the Twelve Tables. (Ancient Law, p. 33.) “The responses of the early lawyers were not however published in the modern sense by their author. They were recorded and edited by his pupils, and were not, therefore, in all probability, arranged according to any scheme of classification. The part of the students in these publications must be carefully noted, because the service they rendered to their teachers seems to have been generally repaid by his sedulous attention to the pupil’s education.” (p. 35.) “The vivid pictures of a leading juriconsult’s daily practice, which abounds in Latin literature—the clients from the country flocking to his ante-chamber in the early morning, and the students standing round with their note-books to record the great lawyer’s replies—are seldom or never identified at any given period with more than one or two conspicuous names.” (p. 37.)

DE JURIS DIVISIONE.

8. Omne autem jus quo utimur vel ad personas pertinet, vel ad res, vel ad actiones. Sed prius videamus de personis.

THE DIVISION OF LAW.

8. Now all our law (*n*) relates either to persons, to things, or to actions. (*o*) But first let us treat of persons.

JUST. i. 12.

(*n*) The proper equivalent of *Jus* in the phrases *Jus civile*, *Jus gentium*, *Jus personarum*, *Jus rerum* is not “right,” but “a body or collection of rules.” Thus, *Jus rerum* does not mean “right of things,” as Blackstone has rendered the phrase, but the rules by which the acquisition, enjoyment, and disposition of things are determined.

(*o*) This threefold division of the law into Persons, Things and Actions, was followed by Justinian, and has been by

most modern writers. It has given rise to much dispute. Actions should not have followed as a third division, but have been distributed under both. Blackstone has a four-fold division :

1. The rights of persons.
2. The rights of things.
3. Private wrongs.
4. Public wrongs, or crimes. (Vol. I. p. 122.)

Serjeant Stephens has the division of Rights and Wrongs, and then subdivides as follows :

1. Personal rights.
2. Rights of property.
3. Rights in private relations.
4. Public rights.
5. Civil injuries.
6. Crimes. (Vol. I. in princip. p. xv).

An action may be regarded as the mode of drawing down a sanction in the case of the infringement of a right. It has been observed that in a certain sense all law is the law of things. In another sense all law is the law of persons. The law of persons is the law of *status*. Thus the law of tutor and pupil, or guardianship, is the law of things as modified by the duties of guardians. So similarly of marriage, &c. In all societies there are persons who have no *status*, and others who possess a perfect *status*. Some jurists will only consider *status* in so far as it is a departure from a standard or perfect status. Personal status follows the individual wherever he goes; for example, a man who is illegitimate in one country is so in another. This is a rule of private international law. (See Story's Conflict of Laws, cap. 4. sec. 60.) Huberus says, "Personal qualities impressed by the laws of any place, surround and accompany the person wherever he goes." *Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, &c.*, (Huberus, de Conf. Leg. lib. I. tit. iii. sec. 12.)

DE CONDICIONE HOMINUM.

9. Et quidem summa divisio de jure personarum hæc est, quod omnes homines aut liberi sunt aut servi.

OF THE STATUS OF MEN.

9. And the principal division relating to persons is this, that all men are either free or slaves.

JUST. i. Tit. 3. pr.

10. Rursus liberorum hominum alii ingenui sunt, alii libertini.

10. Again in regard to free men, some are free-born (*ingenui*), others free-made (*libertini*).

JUST. i. 3. 5.

11. Ingenui sunt, qui liberi nati sunt; libertini, qui ex justa servitute manumissi sunt.

11. Those are *ingenui* who are free born; those are *libertini* who have been manumitted from a legally recognised slavery.

JUST. i. 5. pr.

12. Rursus libertinorum tria sunt genera: nam aut cives Romani, aut Latini, aut dediticiorum numerosunt. De quibus singulis dispiciamus; ac prius de dediticiis.

12. There are again three classes of *libertini*, namely: they are either Roman citizens or Latini, or they are numbered among the *dediticii*. We shall consider each of these separately, and in the first place of the *dediticii*. (*p*)

JUST. i. 5. 2. 3; Cód. vii. 5. 6.

(*p*) These distinctions were abolished by Justinian, and every slave upon emancipation became a *civis Romanus*.

DE DEDITICIIS VEL LEGE ÆLIA SENTIA.

13. Lege itaque Ælia Sentia caveatur, ut qui servi a dominis pœnæ nomine vincti sint, quibusve stigmata inscripta sint, deve quibus ob noxam quæstio tormentis habita sit et in ea noxa fuisse convicti sint, quique ut ferro aut cum bestiis depugnarent traditi sint, inve ludum custodiamve coniecti fuerint, et postea vel ab eodem domino vel ab alio manumissi,

CONCERNING THE DEDITICII OR THE LEX ÆLIA SENTIA. (*q*)

13. By the *lex Ælia Sentia* it is provided, that such slaves as have been fettered by their masters as a punishment or branded by them, or on account of crime have been interrogated by torture and have been convicted of such crime, and those also who have been surrendered as gladiators, or delivered to fight with beasts, or have been given up to the circus, or cast

ejusdem condicionis liberi fiant, cujus
condicionis sunt peregrini dediticii.

into prison; and who afterwards
have been manumitted either by the
same or another master, these shall
be in the same condition as the *peregrini dediticii*.

JUST. i. 5. 2. 3; Cod. vii. 5. 6.

(*q*) The *lex Ælia Sentia* was passed in the time of Augustus, about A.D. 3. Ulpian says “*Dediticiorum numero sunt qui pœnæ causa vincti sunt a domino, quibusve stigmata inscripta fuerunt, quive propter noxam torti nocentesque inventi sunt, quive traditi sunt, ut ferro aut cum bestiis depugnarent, inve ludum vel custodiam coniecti fuerunt, deinde quoquo modo manumissi sunt. Idque lex Ælia Sentia facit.*” (Ulp. Frag. “*de libertis*, i. 11. See also sec. 12 to 15. Dig. 28. tit. v. 57. 60, which treats of the manumission of slaves *in fraudem creditorum*.)

DE PEREGRINIS DEDITICIIS.

14. Vocantur autem *peregrini dediticii* hi qui quondam adversus populum Romanum armis susceptis pugnaverunt, deinde, ut victi sunt, se dediderunt.

CONCERNING THE PEREGRINI DEDITICII.

14. But those are called *peregrini dediticii*, who formerly having taken up arms fought against the Roman people, and when conquered surrendered themselves.

JUST. i. 5. 2. 3; Cod. vii. 5. 6.

15. Hujus ergo turpitudinis servos quocumque modo et cujuscumque ætatis manumissos, etsi pleno jure dominorum fuerint, numquam aut cives Romanos aut Latinos fieri dicemus, sed omni modo dediticiorum numero constitui intellegemus.

15. Therefore, it may be affirmed of slaves who have been thus base, that with whatever formalities, and at whatever age they have been manumitted, although they have been fully and entirely in the possession of their masters, (*pleno jure*) (*r*) they shall never become Roman citizens nor Latini, but shall be regarded in all respects as belonging to the number of the *dediticii*.

JUST. i. 5. 2. 3; Cod. vii. 5. 6.

(*r*) *Pleno jure*, that is, slaves held according to *quiritarian*

right or according to the *jus gentium*, in the so-called quiritarian possession or held *in bonis*. “*Ex jure Quiritium et in bonis*,” says Gneist. See sec. 17. 35.

16. Si vero in nulla tali turpitudine sit servus, manumissum modo civem Romanum, modo Latinum fieri dicemus.

16. But if a slave has no such stain on him, it may be affirmed that he becomes by manumission sometimes a Roman citizen, sometimes a *Latinus*.

JUST. i. 5. 2. 3; Cod. vii. 5. 6.

17. Nam in cujus persona tria hæc concurrunt, ut major sit annorum triginta, et ex jure Quiritium domini, et justa ac legitima manumissione liberetur, id est vindicta aut censu aut *testamento*, is civis Romanus fit: sin vero aliquid eorum deerit Latinus erit.

17. For in whose person the three following requisites meet, viz: that he is more than thirty years of age, that he is held *ex jure quiritium* (s) by his master, and that he is freed by a legally acknowledged manumission, that is, by the *vindicta*, (t) or by the *census*, (u) or by testament, such a one becomes a Roman citizen; but if any one of these requisites is wanting, he will only be a *Latinus*.

JUST. i. 5. 2. 3; Cod. vii. 5. 6.

(s) *Ex jure Quiritium*. Quirinus was the cognomen of Romulus, hence Quirites=Romans. Justinian says, “The law which the Roman people make use of is called the *jus civile* of the Romans or that of the Quirites, as being used by the Quirites; for the Romans are called Quirites from Quirinus.” Property might be held at Rome *ex jure Quiritium, vel in bonis, vel ex utroque jure*. (sec. 2. J. 1. 2. Gai. 1. 54. iii. 166. cf. l. un. C. 7. 25.) Thus the *jus Quiritium* is equivalent to the *jus civile Romanorum*. We often find the expression Dominus and Dominium ex jure Quiritium, as contrasted with *in bonis*. (See the valuable article entitled *Jus* in the Dict. of Greek and Rom. Ant.)

(t) *Vindicta*. The *vindicta* was the staff or rod employed in the solemn manumission of the slave before the proper magistrate; hence we find the expressions *vindictam* (*servo*)

imponere (l. 14. sec. 1. D. 40). *Vindictæ imposita, qua libertas justa munitur* (l. 2. C. 2. 3.) *libertatem imponere* (l. 10. C. 6. 22). The manumission by the *vindicta* was probably the most ancient mode of the three mentioned by Gaius. The ceremony of the manumissio by the *vindicta* was as follows:—The master brought his slave before the *magistratus*, and stated the grounds (*causa*) of the intended manumission. The *lictor* of the *magistratus* laid a rod (*festuca*) on the head of the slave, accompanying this act with certain formal words, in which he declared the former slave to be a free man *ex jure Quiritium*, that is *vindicavit in libertatem*. The master in the meantime held the slave, and after he had pronounced the words “*hunc hominem liberum volo*,” he turned him round and let him go (*emisit e manu*) whence the general name of the act of manumission. (See *in verbo* Manumissio, Dict. Gr. & R. Antiq.)

(u) *Censu*. The census was held at Rome during the time of the republic every five years. It was the register of both the person and the property with a view to the exercise of citizenship. The census was taken in the Campus Martius where the censors sat in their curule chairs and cited the people to appear before them, to give an account of their property. A slave, and also persons *in mancipio* might obtain their freedom by enrolment in the *census*. The manumission of slaves by the censors is described by Ulpian: “Slaves were in former times manumitted by census, when at the lustral census at Rome they, at the bidding of their masters, gave in their census (some read *nomen* instead of *censum*) amongst the Roman citizens.” The principle seems to have been, that those who were enrolled in order to bear the burdens of the state became entitled to the citizenship. (Compare Gai. i. 44, 138, 140; Ulp. Frag. I. 8.)

DE MANUMISSIONE VEL CAUSA PROBATIONE.

18. Quod autem de ætate servi requiritur, lege Ælia Sentia introductum est. Nam ea lex minores

CONCERNING MANUMISSION, OR THE CAUSA PROBATIO.

18. The requirement of a certain age on the part of the slave was introduced by the *lex Ælia Sentia*, (c) for

~~xxx~~ annorum servos non aliter voluit manumissos cives Romanos fieri, quam si vindicta, apud consilium justa causa manumissionis adprobata, liberati fuerint.

that law does not allow slaves of less than thirty years old to become Roman citizens by manumission, except they have been set free by the vindicta and proof of a legally acknowledged ground of manumission (*justa causa manumissionis adprobata*) has been admitted before the consilium. (*w*)

(*v*) The *lex Ælia Sentia* is referred to by Ulpian, who explains its effect in the following terms: "Eadem lege cautum est, ut minor triginta annorum servus vindicta manumissus civis Romanus non fiat, nisi apud consilium causa probata fuerit, id est sine consilio manumissum *lex Ælia Sentia* servum manere putat." (Ulp. I. 12.)

(*w*) *Consilium* not *concilium*, as some recent critics would read. In the *concilium* the parties assembled to hear, in the *consilium* to advise. (See Gronov. on Livy 44. 2. and Karl Wüstemann in his admirable German translation of Theophilus, vol. i. p. 77. note 1.)

The consilium was a select gathering of men, meeting at a fixed period of the year. It met not only at Rome, but also in the provinces. The period when the consilium assembled was that of the meeting of the *conventus*. The *conventus* was the time fixed by the Romans for the arrangement of civil process; something like our Term-time. The Romans were engaged nearly the whole of the year in warlike pursuits; upon the approach of winter, or when obliged to lay down their weapons, they appointed judges to settle the disputes between the citizens. This was the *conventus* to which the litigant parties repaired to appear before the judges. It was on the last day of the *conventus*, as Gaius informs us that the consilium met in the provinces. The president of the province, accompanied by twenty men, took his seat on the tribunal of justice. His associates were called "peregrini recuperatores, quia per eos mancipium naturalem libertatem recipiebat." The legal grounds upon which the proposed manumission was based were then presented to

the court, and if found sufficient the consent of the court was obtained. At Rome the prætor was the judge in cases of freedom, and he was assisted by five senators and five Roman knights. The sitting took place also during the *conventus*, but appears not to have been restricted to the last day. The Roman knight was lower in dignity than the senator. (See Theophilus, Lib. i. tit. 6 and cf. Schulting zum Ulpian.)

19. *Iusta autem causa manumissionis est veluti si quis filium filiamve aut fratrem sororemve naturalem, aut alumnum, aut paedagogum, aut servum procuratoris habendi gratia, aut ancillam matrimonii causa, aput consilium manumittat.*

19. A legally acknowledged ground of manumission is for example, when any one manumits before the council his son, or his daughter, his natural brother, or his natural (*x*) sister, or his foster child, or his preceptor, or a slave in order to make him his procurator, or a female slave for the purpose of marriage.

GAI. i. 39; JUST. i. 6. 5; D. xl. 2. 11. 13.

(*x*) The term *naturale*, is here used in the sense of blood relationship, whether arising under a legal marriage or not. Sometimes it is employed to denote legitimate children as opposed to illegitimate. *Naturales liberi* are children sprung from one's own body in distinction from the "*adoptivi per arrogationem quæsit*." Ulpian says, "*In contra tabulas bonorum possessione liberos accipere debemus sive naturales, sive adoptivos, etc.*" In the Codex, however, it is applied to the children of a concubine, or those begotten in *contubernio*. (Tit. Cod. 5. 27. l. 5. c. 5. 35.)

DE RECUPERATORIBUS.

20. *Consilium autem adhibetur in urbe Roma quidem quinque senatorum et quinque equitum Romanorum puberum; in provinciis autem viginti recuperatorum civium Romanorum. Idque fit ultimo die conventus: sed Romæ certis diebus aput consilium manumittuntur. Majores vero triginta annorum servi semper manu-*

OF THE RECUPERATORES.

20. In the city of Rome the council is formed of five senators and five Roman knights, of the age of puberty; in the provinces of twenty recuperatores (*y*) who are Roman citizens. And this council is held on the last day of the assembly (*conventus*), but at Rome, manumission takes place before the consilium on certain fixed

mitti solent, adeo ut vel in transitu manumittantur, veluti cum Prætor aut Proconsule in balneum vel in theatrum eat.

days. But slaves more than thirty years old may be manumitted at any time, so that manumission may take place even when the prætor or proconsul is going to the bath or to the theatre.

GAI. IV. 46. 105. 109. 141. 185.

(y) These recuperatores were a kind of judges, usually appointed by the prætor both at Rome and in the provinces, to decide in money matters or in disputes respecting the *coronæ murales*, in actions of assault, and in *questions pertaining to the rights of Freedom*. Festus, under the word *reciperatio*, says, “Per reciperatores reddantur res recipianturque, resque privatas inter se persequantur.” The speeches of Cicero for Cæcina and for Tullius were delivered before recuperatores. (Wusteman Theophilus, vol. I. p. 17. note 3).

21. Præterea minor triginta annorum servus manumissione potest civis Romanus fieri, si ab eo domino qui solvendo non erat, testamento eum liberum et heredem relictum.

21. Moreover, a slave less than thirty years of age may by manumission become a Roman citizen, if he has been declared free and appointed heir by the testament of an insolvent master. (z)

[Here occurs a lacuna in the MS.—24 lines are wanting.]

(z) Ulpian says, “Ab eo domino qui solvendo non est servus testamento liber esse jussus et heres institutus, et si minor sit triginta annis, vel in ea causa sit ut dediticius fieri debeat, civis Romanus et heres fit . . . quod et ipsum lex Ælia Sentia facit.” (Ulpian, tit. i. de libertis, sec. 14. Compare also Gaius 154. 160. 276.)

22. —manumissi sunt, Latini Juniani dicuntur: Latini ideo, quia adsimulati sunt Latinis coloniariis; Juniani ideo, quia per legem Juniam libertatem acceperunt, cum olim servi viderentur esse.

22. —those who are thus manumitted are called *Latini Juniani*, (a); they are regarded as Latini because they resemble the *Latinus coloniarius*, (b) they are called *Juniani* because they have received liberty by means of the *lex Junia* (c) whilst they appear formerly to have been slaves.

(a) The *Latini* occupied an intermediate position between the Roman citizens and the *peregrini*. They received manumission according to strict legal forms, but did not attain to the full citizenship; by virtue of the *lex Junia Norbana* there was conceded to them the rights of the *Latini coloniarii*, that is to say the *commercium*, but not the *connubium*; hence they were called *Latini Juniani*.

The enfranchised Latins could be instituted heirs, and acquire the inheritance which was bestowed upon them, if within the space of a hundred days they complied with the necessary conditions to enable them to become Roman citizens. So long as they had not the quality of citizens, they could not take an inheritance direct. (Marezoll, Ed. VI. p. 182; Domenget, p. 23.)

(b) *Latinis colonariis*. These were the inhabitants of Latin colonies north of the Po.

(c) The *lex Junia* is supposed to have been passed A.U.C. 772, and the year 19 A.D., at which time Tiberius reigned at Rome. In the year 772 A.U.C. Junius Silanus et Junius Norbanus were consuls. The common opinion is that the *lex Junia Norbana* was passed after the *lex Ælia Sentia*; many jurists however are of a different opinion, as Cujacius, who believes that it was passed in the reign of Augustus. Noordkerk even thinks it was passed in the time of the Republic, as early as the year 671 A.U.C., at which time Junius Norbanus et L. Cornelius Scipio were the consuls. Hollweg, and Hugo have observed that it is not usual for a *lex* to derive two names from the same man. This law is very often simply called the *lex Junia*. Theophilus and Justinian refer to it as the *lex Junia Norbana*. Professor von Vangerow, in summing up the various opinions and arguments upon this much discussed point, says, the result of our examination upon this subject up to the present time is that the *lex Junia* was passed after the year 756, in the second half of the eighth century of the state. As during this period, namely in the year 772 A.U.C., we find two consuls whose names exactly correspond

to this *lex*, it is more than probable that the law was passed in this year. Such being the case, it is very easy to explain why the *lex* is, as the rule, called simply the *lex Junia*, and only very seldom the *lex Junia Norbana*. It was usual to name the *leges* after the family names of the consuls, which, in the case of M. Junius Silvanus and C. Junius Norbanus, were both the same. Goeschen has observed correctly, that it is only Justinian and Theophilus who employ the double name *Junia* and *Norbana*.

The ancient law of Rome knew no degrees of liberty. A slave manumitted by means of the *vindicta*, the census, or by testament, attained at once to the right of citizenship, whilst, if the master expressed his intention to free his slave in any other way, a kind of *quasi* freedom only resulted, entirely dependent upon the good-will of the owner. At a subsequent period—when is unknown to us—the prætor promised his protection to the person in whose freedom there was this fatal flaw. On this subject see Von Vangerow's "*Latini Juniani*," *passim* Marburg 1833. This is the most exhaustive treatise upon the subject that has yet been written. (*Frag. vet. Icti. ap. Dosith, sec. 6.*) "*Primum ergo videamus, quale est, quod dicitur, eos, qui inter amicos veteres manumittebantur, non esse liberos, sed domini voluntate in libertate morari, et tantum serviendi metu liberari. Antea enim una libertas erat, et libertas fiebat vel ex vindicta, vel testamento, vel in censu, et civitas Romana competit manumissis, quæ appellatur legitima libertas. Hi autem, qui domini voluntate in libertate erant, manebant servi, et manumissores audebant eos iterum per vim in servitutem ducere sed interveniebat prætor et non permittebat manumissum servire.*" The classical scholar will remember the passage in *Cic. Top. c. 2*, where he says "*Si neque censu, neque vindicta, nec testamento liber factus est, non est liber.*" Also, *pro. Balbo, c. 9*, "*libertate, id est civitate.*" When Niebuhr says, *Rom. His. I. p. 622*, 2nd edit., that in the most ancient times the only known form of manumission was that conferred by the *vindicta*, and that

a mere rude freedom resulted from the census, he is unable to give the slightest proof for such an assertion.

When the solemn form of freedom was neglected, however much benefit the owner intended to bestow, the man remained still a slave, and could possess no property. All that he might subsequently acquire went to the master. The only advantage of this informal manumission was that the slave was not obliged to perform slave labour. It can scarcely be doubted, although we have no evidence upon the point, that the children born to one in this *quasi* freedom would be born slaves.

Frag. Dosith. sec. 7.—“*Omnia autem, tanquam servus, acquirebat manumissori, vel, si quid stipulabatur, vel per scripturam accipiebat, vel ex quacunque alia causa adquisierat, domini hoc faciebat; hoc est, manumissus omnia bona patrono acquirebat.*” (Comp. Gai. iii. 56.)

Thus the law remained till the time of Tiberius, when it was provided by the *lex Junia* for the first time, that a slave thus informally freed should nevertheless attain to the enjoyment of true freedom. However, according to this *lex* he did not become a Roman citizen, but his legal status resembled that of a *Latinus colonarius*, whose name is also here mentioned in the same connection.

Frag. Dosith, sec. 8.—“*Sed nunc habent propriam libertatem, qui inter amicos manumittuntur; et fiunt Latini Juniani, quoniam lex Junia, quæ libertatem iis dedit, exæquavit eos Latinis colonariis, qui cum essent cives Romani liberti nomen suum in coloniam dederant.*”

Of the legal condition of the *Latini Juniani*, the authorities present a most dismal picture. Thus, Constantine describes their condition as one mid-way between freedom and slavery.—“*Sobolem vero, quæ patre servo fiscali, matre nascetur ingenua, medium tenere fortuna, ut, servorum liberi et spurii liberorum, Latini sint, qui licet servitutis necessitate solvantur, patroni tamen privilegio tenebuntur.*” Salvianus also speaks of a “*jugum Latinæ libertatis*,” of a “*Latinæ libertatis vinculum*;” so also Justinian has the

quaint passage, “*libertas Latinorum imperfecta et quasi per satyram inducta.*” What he means by *satyram inducta* it is difficult to say. It is most probable that he means that their condition is an incongruous mixture between freedom and slavery. This gloomy picture of their condition has been often aptly and forcibly expressed by saying that these Latini Juniani, whilst they were permitted to live as free, died as slaves. On this interesting subject, see Hein-eccii Antiq. Rom. edit. Muhlenbruch, lib. I. tit. v. sec. 1. 2. et seq. Ganz. Scholien zum Gaius, p. 59. Theophilus, lib. I. tit. v. sec. 3, and especially the treatise of Von Vangerow above referred to.

23. Non tamen illis permittit lex Junia nec ipsis testamentum facere, nec ex testamento alieno capere, nec tutores testamento dari.

23. Nor yet does the lex Junia permit them to make a will, nor to acquire by the testament of another, nor can they be named as tutors in a will.

24. Quod autem diximus ex testamento eos capere non posse, ita intellegendum est, ut nihil directo hereditatis legatorumve nomine eos posse capere dicamus; alioquin per fidei-commissum capere possunt.

24. But when we say that they cannot acquire by testament, it must be so understood, that we affirm that they cannot directly take by way of inheritance or of legacy; otherwise they may acquire by testamentary trust (fidei-commissum).

25. Hi vero qui dediticiorum numero sunt nullo modo ex testamento capere possunt, non magis quam qui liber peregrinusque est. Nec ipsi testamentum facere possunt secundum quod plerisque placuit.

25. Those, on the other hand, who are reckoned among the *dediticii*, can in no kind of way acquire by testament, any more than those who are in the number of the *liberi* and *peregrini*, nor can they according to the prevailing opinion, make a valid testament.

26. Pessima itaque libertas eorum est qui dediticiorum numero sunt: nec ulla lege aut senatusconsulto aut constitutione principali aditus illis ad civitatem Romanam datur.

26. Therefore that is the worst kind of freedom which is possessed by those who are reckoned among the *dediticii*; nor is admission to the Roman citizenship given them by any law, or senatus-consultum, or imperial constitution.

27. Quin et in urbe Roma vel intra centesimum urbis Romæ miliarium morari prohibentur; et si contra fecerint, ipsi bonaque eorum publice venire jubentur ea condicione, ut ne in urbe Roma vel intra centesimum urbis Romæ miliarium serviant, neve umquam manumittantur; et si manumissi fuerint, servi populi Romani esse jubentur. Et hæc ita lege Ælia Sentia comprehensa sunt.

27. Moreover, they are prohibited from dwelling in the city of Rome, or even within a hundred miles of the city, and if they violate this command, they themselves, and their goods, shall be sold publicly, (d) under this condition, that they shall not serve as slaves in the city of Rome, nor within a circuit of a hundred miles therefrom, nor shall they ever be manumitted, and if they have been manumitted, they shall be adjudged slaves of the Roman people. This is thus determined by the lex Ælia Sentia.

JUST. i. 5. 3; iii. 7. 4.

(d) "*Venire publice.*" Domenget says that "are sold publicly" is not the correct rendering here, and he translates it "*eux et leurs biens sont vendus au profit du trésor public.*"

QUIBUS modis LATINI ad CIVITATEM ROMANAM PERVENIANT.

28. Latini multis modis ad civitatem Romanam perveniunt.

29. Statim enim eadem lege Ælia Sentia cautum est, ut minores triginta annorum manumissi et Latini facti, si uxores duxerint vel cives Romanas, vel Latinas coloniarias, vel ejusdem condicionis cujus et ipsi essent, idque testati fuerint adhibitis non minus quam septem testibus civibus Romanis puberibus, et filium procreaverint, et is filius anniculus fuerit, permittatur eis, si velint, per eam legem adire prætorem vel in provinciis præsidem provinciæ, et adprobare se ex lege Ælia Sentia uxorem duxisse et ex ea filium anniculum habere; et si is aput quem causa probata est id ita esse pronuntiaverit, tunc et ipse Latinus et uxor ejus, si et ipsa ejus-

THE MANNER IN WHICH LATINI ATTAIN TO THE ROMAN CIVITAS.

28. The Latini may attain to the Roman citizenship in various ways.

29. For it is immediately provided by that same lex Ælia Sentia, that those who have been manumitted, under thirty years of age, and become Latini—if they have married wives who are either Roman citizens, Latinæ coloniariæ, (e) or women of the same legal status as themselves, if they have proved that fact by having called in not less than seven Roman citizens of full age as witnesses, and if they have also begotten a son who has attained to the age of one year (anniculus)—may be permitted if they so wish, by virtue of this law, to go to the prætor, or if in the provinces, to the governor of the province,

dem condicionis sit, et ipsorum filius, si et ipse ejusdem condicionis sit, cives Romani esse jubentur.

and prove the marriage of a wife in accordance with the provisions of the *lex Ælia Sentia*, also that there is issue from that marriage a son of a year old; and if he before whom cause has been shown (*causa probata est*) shall have pronounced that it is so, then shall the Latinus himself and his wife, if she be also of the same status, and their son, if he be of the same legal condition, be adjudged to be Roman citizens. (*f*)

(*e*) Roman citizens settled in the colonies, who had surrendered their citizenship in exchange for public lands. These are not to be confounded with the people of Latinum, properly so called, nor with the old Roman colonists (*civium Romanorum*) who were placed in conquered towns, and still continued to be Roman citizens. (See Art. Colonia Dict. Gr. and Rom. Ant., and the authorities referred to there.)

(*f*) In relation to the *causæ probatio ex lege Ælia Sentia*, or, as it is sometimes termed, the *anniculi probatio*, it is to be observed that the essential requisites of this *causæ probatio* consisted in the following. The Latinus, his wife and child, might attain to the *civitas* when he proved before the magistrate, that he had married a woman of a higher *status* or of one similar to his own, and also that there had been born from this marriage a son who had attained to a year old. This proof must be given not only before the magistrate but in the presence of at least seven witnesses, and with the formula *liberorum quærendorum causa*. We are indebted to Gaius for the certain information that the *lex Ælia* was the original source of the *anniculi probatio*. Before the discovery of Gaius no one imagined that this *lex Ælia* was the origin of this law of the *anniculus*. The principal passage upon this point, before the finding of Gaius, was that contained in Ulpianus Frag. tit. iii. de Latinis sec. 3: "Lib-

eris jus Quiritium consequitur Latinus qui minor triginta annorum manumissionis tempore fuit: nam lege Jūnia cautum est, ut si civem Romanam vel Latinam uxorem duxerit, testatione interposita quod liberorum quærendorum causa uxorem duxerit, postea filio filiave nato natave et anniculo facto, possit apud prætorem vel præsidem provinciæ causam probare et fieri civis Romanus, tam ipse quam filius filiave ejus et uxor; scilicet si et ipsa Latina sit; nam si uxor civis Romana sit, partus quoque civis Romanus est ex senatus consulto quod auctore divo Hadriano factum est."

Notwithstanding this fragment of Ulpianus, the older jurists entertained great doubts upon the subject. By many writers the *lex Julia et Papia Poppæa* was formerly regarded as the origin of this law. (See Pithæus ad Collat. xvi. 6. Jac. Gothfred ad leg. Jul. et Pap. Popp. c. 9. in Ottothes. tom. iii. p. 218; Schulting ad Ulp. cit. Heinecc. ad leg. Jul. et Pap. Popp. lib. ii. c. 9, &c.) Against this manifestly groundless opinion compare Bethm. Hollweg. "de caus. prob." p. 30 et seq. There seems to be no authority for the opinion of Ganz given in his "scholien zum Gaius," that the *lex Ælia* renewed or confirmed, with certain modifications, that which had been passed by the *lex Junia*. His idea is that by the *lex Junia* slaves manumitted by the *vindicta sine consilio* became Latini; whilst the *lex Ælia* gave the possession of freedom to those who were manumitted *ex testamento*. It is in this way that he endeavours to reconcile the doubtful statement of Ulpianus with the undoubtedly reliable one of Gaius. At the present time no one doubts that the *anniculi probatio* was introduced by the *lex Ælia Sentia*. The political reasons for this law are obvious. The civil wars in which Rome had been engaged, and through which it had lost so large a part of its population, rendered it the policy of the state to encourage marriage in every possible way, so as to fill up the gap in its population. (See Von Vangerow Lat. Jun. sec. 32. p. 164 et seq. Ganz Schol. p. 77.) Von Vangerow is the principal writer on the Latini Juniani.

30. Ideo autem in ipsorum filio adjecimus "si et ipse ejusdem conditionis sit," quia si uxor Latini civis Romana est, qui ex ea nascitur ex novo senatusconsulto quod auctore divo Hadriano factum est, civis Romanus nascitur.

30. This is the reason why we have added "if their son be of the same legal condition," because if the wife of the Latinus is a Roman citizen, the child born of her is, according to a new senatus-consultum made by the authority of Emperor Hadrian, by birth a Roman citizen.

31. Hoc tamen jus adipiscendæ civitatis Romanæ etiamsi soli minores triginta annorum manumissi et Latini facti ex lege Ælia Sentia habuerunt, tamen postea senatusconsulto quod Pegaso et Pusione Consulibus factum est, etiam majoribus triginta annorum manumissis Latinis factis concessum est.

31. Although those only who being less than thirty years of age had been manumitted and become Latini, possessed under the lex Ælia Sentia this privilege of obtaining Roman citizenship; yet subsequently by a senatus-consultum made during the consulship of Pegasus and Pusio, (g) it was conceded to those who being more than thirty years of age had been manumitted and had become Latini.

(g) The senatus-consultum referred to was passed in the year of Rome 823, during the reign of the Emperor Vespasian: "Vespasiani Aug. temporibus, Pegaso et Pusione consulibus senatus censuit," says Justinian in his Institutes, sec. 5, de fidei hered. ii. 23.

32. Ceterum etiamsi ante decesserit Latinus, quam anniculi filii causam probarit, potest mater ejus causam probare, et sic et ipsa fiet civis Romana.

32. Moreover, although the Latinus shall die before he shall have proved his suit in regard to his son of a year old, still the mother may establish the point, and so by this means she herself may become a Roman citizen.

33. [Restored by Goeschen.] Lege Julia cautum est, ut Latinus si in perficiendo ædificio Romæ non minus quam partem semissariam patrimonii sui impenderit jus Quiritium consequatur.

33. By the lex Julia it is provided that a Latinus may acquire the jus Quiritium if he has expended upon the completion of a building in Rome not less than the half of his patrimony.

[Lacunæ occur here: two paragraphs consisting of fifteen lines are illegible.]

This gap may be restored in substance according to the opinion of Goeschen, from the fragments of Ulpianus, who says, “Navi Latinus civitatem Romanam accipit, si non minorem quam decem milium modiorum navem fabricaverit, et Romani sex annis frumentum portaverit, ex edicto divi Claudii.”

“Militia jus quiritium accipit Latinus (si) inter vigiles Romæ sex annos militaverit, ex lege Visellia. Præterea ex senatusconsulto concessum est ei, ut, si triennium inter vigiles militaverit, jus Quiritium consequatur.” (Ulp. Frag. tit. iii. secs. 6 & 5.)

Sec. 6. By means of a ship a Latinus gains the Roman *civitas*, if he has built a vessel capable of carrying not less than 10,000 bushels, and has brought grain to Rome in it for a period of six years, in accordance with an edict of Claudius. It will be remembered that a terrible famine prevailed in the reign of this emperor, who flourished in the years 41 to 54 A.D. This famine is referred to in the sacred writings: “And in these days came prophets from Jerusalem unto Antioch. And there stood up one of them named Agabus, and signified by the spirit that there should be great dearth throughout the world: *which came to pass in the days of Claudius Cæsar.*” (Acts xi. 27. 28.)

Sec. 5. A Latinus also attains the *jus Quiritium* by means of military service if he has served for six years among the *vigiles* at Rome, by the provisions of the *lex Visellia*. Moreover, by virtue of a *senatus-consultum*, the *jus Quiritium* is also conceded to him if he has served three years successively among the *vigiles*.

These *vigiles* according to Dion. Cassius consisted of seven cohorts of troops, and were instituted by Augustus for the defence of the city. In the time of Tacitus they ceased to be considered as soldiers, for that writer takes no notice of them when, in enumerating the guards of Rome, he mentions three urban and nine prætorian cohorts. (Tac. Ann. iv. 5. and Smith's Gr. and Rom. Ant. p. 97 b. 787 a.) These seven cohorts of watch-soldiers originally consisted of

freed-men, but afterwards of others. There was one cohort for each of the two districts into which the city was divided. (Tit. D. 1. 15. C. 1. 43. l. 4. c. 12. 55.)

35. *Si quis alicujus et in bonis et ex jure Quiritium sit, manumissus, ab eodem scilicet, et Latinus fieri potest et jus Quiritium consequi.*

35. But if anyone is held *in bonis* and *ex jure Quiritium* by another, he may, by means of manumission from the same become both a Latinus and attain to the *jus Quiritium*.

36. *Non tamen cuicumque volenti manumittere licet.*

36. Still it is not permitted to everyone who pleases to manumit.

37. *Nam is qui in fraudem creditorum vel in fraudem patroni manumittit, nihil agit, quia lex Ælia Sentia inedit libertatem.*

37. For he who manumits in order to defraud his creditors (*h*) or to cheat his patron accomplishes nothing because in this case the *lex Ælia Sentia* prevents the grant of freedom.

JUST. i. 6. pr, 1—3.

(*h*) *Dosithei* Interp. sec. 16. Lachmann: *Servum pigneri datum civem Romanum facere debitor non potest, nisi si forte solvendo sit.*

38. *Item eadem lege minori xx annorum domino non aliter manumittere permittitur, quam si vindicta aput consilium justa causa manumissionis adprobata fuerit.*

38. Also by the same law it is not permitted a master who is less than twenty years of age to manumit, except by the *vindicta*, a legally acknowledged ground of manumission having been approved by the council.

JUST. i. 6. 4.

39. *Justæ autem causæ manumissionis sunt: veluti si quis patrem aut matrem aut pædagogum aut conlataneum manumittat. Sed et illæ causæ, quas superius in servo minore xxx annorum exposuimus, ad hunc quoque casum de quo loquimur adferri possunt. Item ex diverso hæ causæ, quas in minore xx annorum*

39. But these are legally acknowledged grounds of manumission; as for example, if anyone manumits his father or his mother, his pedagogue, (*i*) or his foster-brother; but those grounds which we have set out above relatively to a slave who is less than thirty years of age, may be also applied to this last case of which we

domino retulimus, porrigi possunt et
ad servum minorem xxx annorum.

speak; so also, on the other hand, the grounds which we have presented in relation to a master who has not yet attained twenty years of age, may be extended also to the slave who is less than thirty years old. (.)

JUST. i. 6.

(i) *Pædagogus*: this was a slave who exercised the oversight of children. With the Romans as with the Greeks his duty was “rather to guard from evil, both physical and moral, than to communicate instruction, to cultivate the minds, or to impart accomplishments.” Ulpian contrasts the *pædagogus* with the person who had charge of the education of a youth properly so called: he says, “si collactaneus, si *educator*, si *pædagogus* ipsius, &c. (L. 13. D. 40. 2; l. 35. D. 40. 5; l. 15. sec. 16. D. 47. 10.)

(j) Theophilus in his paraphrase on the Institutes of Justinian explains the grounds upon which a minor of less than twenty years may manumit his father and his mother. He supposes the case of a father, a mother and son being slaves and under the same *potestas*. The owner frees the son and institutes him as his heir, by which means the father and the mother of the instituted slave are brought under the son's *potestas*; in this case the minor was permitted to manumit, although under twenty years of age. Theophilus says, the son would not wish to see his parents disgraced by continuing in a state of slavery whilst he was himself free. He also mentions the following cases. A man becomes enamoured of his slave, and has by her a son or a daughter. Such children following the condition of their mother were slaves in accordance with the principle *partus sequitur ventrem*. The son or the daughter being still in slavery, might come, upon the death of the father, under the *potestas* of their own brother. It was a legal ground to say—“He is my natural brother, or she is my natural sister.” As a valid ground a man might say that the slave was his *pædagogus*

his *educator*, his *nurse*, his *alumnus*, or his *collocatus* or that he wished to manumit his slave "*procuratoris habendi gratia*." Justinian required that a slave when emancipated with a view to his being appointed as a procurator should be at least seventeen years of age. A procurator below that age could not represent his principal in any action. Ulpian says, "*minor annis decem et septem, prohibet postulare, quia moderatam hanc aetatem ratus est ad procedendum in publicam*." (L. 1. s. 3. de postulando D. 1. 1. Theophilus lib. i. tit. 6. sec. 5.)

In another passage Ulpian says that a minor to be a procurator must be *decem et octo annis*. This passage may be reconciled with what is said in the Institutes by understanding him to mean, that the minor must have entered upon his eighteenth year. A master who manumitted his slave for the purpose of matrimony must marry her within six months. "*Si collocatus, si educator, si pædagogus ipsius, si nutrix, vel filius filiae ejus eorum, vel alumnus, vel capsarius, id est qui portat libros, vel si in hoc manumittatur, ut procurator sit dummodo non minor annis decem et octo sit; præterea et illud exigitur, ut non utique unum servum habeat, qui manumittit. Item si matrimonii causa virgo vel mulier manumittatur, exacto prius jure jurando, ut intra sex menses uxorem eam duci oporteat, ita enim Senatus censuit*." (L. 13. de mann. vind. D. 40. 2. Wüstermann's note, i. on Theoph. p. 81.)

Justinian modified the law in relation to a minor of less than twenty years of age by permitting him to manumit by testament as well as by the *vindicta*. (Just. lib. 1. tit. vi. s. 7.) A further alteration of the *lex Ælia Sentia* was made by Justinian in the Novellæ about nine years afterwards. When the minor attained to fourteen years of age he had the *testamenti factio* and from that age he could manumit his slave. The Emperor says, "*Sancimus ut licentia pateat minoribus in ipso tempore, in quo ipsis de reliqua eorum substantia disponere permittitur, etiam servos suos in ultimis voluntatibus manumittere*." (Nov. 119. 2.)

40. Cum ergo certus modus manumittendi minoribus xx annorum dominis per legem Æliam Sentiam constitutus sit, evenit, ut qui xiiii annos ætatis expleverit, licet testamentum facere possit, et in eo heredem sibi instituere legataque relinquere possit, tamen, si adhuc minor sit annorum xx, libertatem servo dare non potest.

40. Since then a certain mode of enfranchisement is established by the lex Ælia Sentia for those owners who are less than twenty years of age, it comes to pass that he who has completed his fourteenth year may exercise the *testamenti factio*, (k) institute an heir, and bequeath legacies, yet if he be less than twenty years of age, he cannot give freedom to a slave."

JUST. I. 6. 7.

(k) *Testamentum facere*. The expression *testamenti factio* has three meanings. 1. Competency to make a testament, which is called *testamenti factio activa*. 2. Competency to take property by virtue of a testament; this is termed *testamenti factio passiva*. 3. Competency to become a witness to a testament. Amongst those who could not make a testament or will under the Roman law were minors, lunatics, prodigals, and deaf and dumb persons. Those who were only deaf or only dumb might make a will or testament. Children, however, had no power to make a will except in relation to their so-called *peculium castrense*, or *quasi castrense*. Augustus, Nerva and Trajan allowed *filiï fam.* to bequeath their *peculium castrense*, but only whilst on active service. Hadrian allowed the same privilege to *veterani filii fam.* Children had no power to dispose of their *peculium adventicium*, nor to make a *donatio mortis causa*. The latter could be made, and the *peculium profecticium*, bequeathed upon obtaining the assent of the *pater familias*. The competency must exist at the time of the making of the will or it would be invalid. If the person making a will had the *testamenti factio* at the time of its execution, although he might subsequently lose his qualification, the will was still valid. This was the law except when the *testamenti factio* was lost by a *capitis deminutio*. This, to use an old phrase, ransacked the will. The reason of this was, because it was not possible for a *filius familias* to die testate. Many passages might be quoted to explain and

illustrate the Roman idea of the *testamenti factio*. The following should be remembered. Gaius says—"si quæramus, an valeat testamentum, imprimis animadvertere debeamus, an is, qui id fecerit, habuerit *testamenti factionem*." Some persons are said to have the *testamenti factio* although they may not be able to *make* a will; they have it *passiva*. Thus, Pomponius and Marcellus say—"Filius familias, et servus alienus, et surdus testamenti factionem habere dicuntur; licet enim testamentum facere non possunt, attamen ex testamento vel sibi, vel aliis acquirere possunt. Marcellus notat; furiosus quoque testamenti factionem habet, licet testamentum facere non potest. Ideo autem habet testamenti factionem, quia potest sibi acquirere legatum vel fideicommissum; nam etiam compotibus mentis personales actiones etiam ignorantibus acquiruntur." Ulpian says, "Heredes institui possunt, qui testamenti factionem cum testatore habent." In the Institutes it is said; "Testes adhiberi possunt ii, cum quibus testamenti factio est." (Gaius ii. 114; l. 16 "qui test. fac. possunt," D. 28. 1; Ulp. Frag. 22. i; Inst. Just. ii. 10; Moehler 190. 191; Von Vangerow Pandecten, vol ii. pp. 83 et seq.)

41. Et quamvis Latinum facere velit minor xx annorum dominus, tamen nihilominus debet apud consilium causam probare, et ita postea inter amicos manumittere.

41. And although a master less than twenty years of age wish to make a Latinus, yet nevertheless he ought to show good reason for doing so before the council, and afterwards to manumit in the presence of his friends.

42. Præterea lege Furia Caninia certus modus constitutus est in servis testamento manumittendis.

42. Moreover by the lex Furia (l) Caninia a certain rule is established for the manumission of slaves by testament.

JUST. i. 7.

(l) The lex Furia (sive Fusia) Caninia passed in the year 761 A.U.C. or 8 A.D., four years after the lex Ælia Sentia. (Suet. Aug. 40.) The next section contains an important

extract from this lex. The law was repealed by Justinian after having been in operation about 500 years. (Ulp. Frag. i. sec. 24, tit. i. de l. Furia Caninia sublata, i. 7.)

The tendency of the lex Furia Caninia, like that of the lex Ælia Sentia, was to prevent the immoderate manumission of slaves. It permitted manumission by means of a will, with certain limitations, according to the number of slaves owned. It did not allow in any case more than one hundred slaves to be manumitted by testament. As its provisions only applied to cases where a man had more than two slaves, the owner of one slave was not affected by this lex. The slaves must be named, and the scale by which the manumission was fixed was a half, one-third, one-fourth and one-fifth of the whole number that the testator possessed. It was about the year 7 A.D. that this lex was passed and several senatus-consulta were subsequently made to prevent its evasion. Many Roman citizens, in order to have a crowd of freedmen at their funerals, and to gratify their vanity, or to make a parade of their benevolence, gave freedom to those whom they could no longer personally hold in bondage. (Sueton. Oct. 40. Cod. 5. tit. iii "de lege Fus. Can. tollenda," Art. Manumissio Dict. Gr. and Rom. Ant. p. 596; Sandars' Just. pp. 106, 107; Cumin's Manual, p. 19.)

Ulpian explains this lex as follows: "Lex Furia Caninia jubet testamento ex tribus servis non plures quam duos manumitti; et usque ad decem dimidiam partem manumittere concedit; a decem usque ad triginta tertiam partem, ut tamen adhuc quinque manumittere liceat æque ut ex priori numero; a triginta usque ad centum quartam partem æque ut decem ex superiori numero liberari possint, a centum usque ad quingentos partem quintam similiter ut ex antecedenti numero viginti quinque possint fieri liberi et denique præcipit ne plures omnino quam centum ex cujusquam testamento liberi fiant. *Eadem lex caret, ut libertates servis testamento nominatim dentur.*" (Ulp. Frag. tit. i. de libertis, secs. 24, 25.)

43. Nam ei qui plures quam duos neque plures quam decem servos habebit, usque ad partem dimidiam ejus numeri manumittere permittitur. *Ei vero qui plures quam x neque plures quam xxx servos habebit, usque ad tertiam partem ejus numeri manumittere permittitur. At ei qui plures quam xxx, neque plures quam centum habebit, usque ad partem quartam manumittere permittitur, nec latior licentia datur.* Novissime ei qui plures quam c habebit, nec plures quam d, *amplius non* permittitur, quam ut quintam partem, neque plures *manumittat*. Sed præscribit lex, ne cui plures manumittere liceat quam c *igitur* si quis unum servum omnino aut duos habet, *de eo hæc lege nihil cautum est*; et ideo liberam habet potestatem manumittendi.

43. He who shall have above two and not more than ten slaves is permitted to manumit them to the extent of one half; he who shall have more than ten and not above thirty is permitted to manumit them to the extent of one third; but he who shall have more than thirty and not more than one hundred may enfranchise up to one fourth part, but not extend his indulgence further; lastly, he who shall have more than a hundred and not more than five hundred may manumit a fifth part of them, but not more. But this law provides, that no one shall manumit more than one hundred slaves; on the other hand, if any one has only one or two slaves, no provision is made in this law for such a case; (*m*) and thus the owner has free power of manumission.

(*m*) Goeschen says, "Tale quid requirere sententiam videtur: de eo hæc lege nihil cautum est."

44. Ac nec ad eos *quidem* omnino hæc lex pertinet, qui sine testamento manumittunt. Itaque licet iis, qui vindicta aut censu aut inter amicos manumittunt, totam familiam suam liberare, scilicet si alia causa non impediat libertatem.

44. This law does not apply at all to those who are enfranchised otherwise than by testament. It is permitted therefore to those who manumit by the *vindicta*, or by the *census*, or *among friends*, to free all their slaves, provided there is no other impediment to their freedom. (*n*)

(*n*) In the instances of manumission previously mentioned the interest of the master was a guarantee for his not exceeding the prescribed legal limit of manumissions. It is, however, obvious that this guarantee did not exist in the case of manumission by testament. Sometimes a testator would, in his testament, manumit the slave of his legatee. Paulus says, "legatorius non est compellendus, ut manumittat, quoniam toties secundum voluntatem testatoris facere compellitur, quoties contra legem nihil est futurum." (L. 37. de cond. D. 35. 1.)

15. Sed quod de numero servorum testamento manumittendorum diximus, ita intellegamus, ut ex eo numero, ex quo dimidia aut tertia aut quarta aut quinta pars liberari potest utique, tot manumittere liceat, quot ex antecedenti numero licuit. Et hoc ipsa lege provisum est. Erat enim sane absurdum, ut x servorum domino quinque liberare liceret, quia usque ad dimidiam partem ex eo numero manumittere ei conceditur, ulterius autem XII servos habenti non plures liceret manumittere quam III. At eis qui plures quam x neque . . .

45. But what we have said in regard to the number of slaves that one may manumit by testament, is to be so understood that out of that number from which the half, the third-part, the fourth, the fifth may be freed, at all events it was permitted to manumit as many as are allowed by the preceding number, and this is provided by the law itself: for it was truly absurd, that the master of ten slaves should be permitted to enfranchise five, because it is conceded to him to manumit to the extent of one half; while on the other hand the owner of a dozen slaves should not be permitted to manumit more than four. But those who above ten and not . .

. . . (o)

(o) A lacuna occurs here in the MS., and about twenty-four lines are missing. It is proposed to fill this gap up from Gai. Epit. i. 2. sec. 2, hæc exhibit: "Nam si aliquis testamento plures manumittere voluerit, quam quot continet numerus supra scriptus, ordo servandus est: ut illis tantum libertas valeat, qui prius manumissi sunt, usque ad illum numerum, quem explanatio continet superius comprehensa; qui vero postea supra constitutum numerum manumissi leguntur in servitute eos certum est permanere. Quodsi non nominatim servi vel ancillæ in testamento manumittantur, sed confuse omnes servos suos vel ancillas is, qui testamentum facit, liberos facere voluerit, nulli penitus firma esse jubetur hoc ordine data libertas. Sed omnes in servile condicione, qui hoc ordine manumissi sunt, permanebunt." For if anyone would manumit by testament more than the number above mentioned, the following order must be observed: that only those are to enjoy liberty who are first manumitted, till the number reaches that already mentioned; all remaining over and above this number without doubt remain in slavery. If however male and female slaves in a body are declared free by testament, without mentioning

their names, the testator having declared his wish to free all his slaves without specially denoting them (*confuse*) in such a case not a single one shall attain to freedom, but all thus declared free shall remain in slavery. (Cf. Gai. i. 139. ii. 239; Ulp. i. 24 25.)

46. Nam et si testamento scriptis in orbem servis libertas data sit, quia nullus ordo manumissionis invenitur, nulli liberi erunt; quia lex Furia Caninia quæ in fraudem ejus facta sint rescindit. Sunt etiam specialia senatusconsulta, quibus rescissa sunt ea quæ in fraudem ejus legis excogitata sunt.

46. For also, if in a testament, freedom be given to slaves their names being written in a circle, since no order of manumission can be discovered, none will be free (*p*) because the lex Furia Caninia rescinds that which is done with a view to its evasion: there are also special senatus-consulta by which those things are rescinded which contemplate an evasion of that law.

(*p*) The reason of this is because one cannot ascertain in a circle, or, as it is termed, in a "round robin," whose name is intended to come first and whose to come last. It is however a general rule of Roman law that in all cases of doubt you must lean to the side of freedom.

47. In summa sciendum est, cum lege Ælia Sentia cautum sit, ut qui creditorum fraudandorum causa manumissi sint liberi non fiant, etiam hoc ad peregrinos pertinere (senatus ita censuit ex auctoritate Hadriani); cetera vero jura ejus legis ad peregrinos non pertinere.

47. In fine it must be observed that it is provided by the lex Ælia Sentia, that those who are manumitted for the sake of defrauding creditors, do not become free: this rule of law also applies to the *peregrini* as the Senate on the authority of Hadrian has determined; but the other rules established by this lex do not relate to the *peregrini*.

48. Sequitur de jure personarum alia divisio. Nam quædam personæ sui juris sunt, quædam alieno juri sunt subjectæ.

48. We now come to another division relative to the rights of persons: (*q*) for some persons are *sui juris* (*r*) some are subjected *alieno juri*.

(q) *Persona*, or legal personality, is that attribute in a man which renders him capable of the enjoyment of rights. As a proof that this notion of person is used in Roman law in a purely technical sense, the following maxims should be remembered *unus homo plures sustinere potest personas*. Again, on the other hand, *plures homines unam sustinere possunt personam*. (See Mühlenbruch Instit. sec. 49.)

The idea contained in the word *persona* is one of the greatest importance in Roman law. A slave, for instance, is a nullity in law because he has no *persona*. Every *persona* has a *status* or *caput*. The idea of *persona* also attached in a peculiar manner to the inheritance. Before the heir entered the *hereditas jacens* was a person and had personal rights, and a curator was even appointed to protect it. In Roman law children who are born dead are regarded as never having existed, consequently they have no *persona*. The Roman lawyers in medical questions followed Hippocrates—by far the greatest authority of antiquity in such matters. Christianity destroyed the old doctrine of monsters, and it was held that a thing born of a woman must have a soul. As far as its own interests are concerned the child *in utero* is considered as living, but not for the interests of third persons. When a man is born of a legitimate marriage his existence dates from his very conception, if illegitimately born his existence dates from his birth. Persons were not considered to have full intellect, until they had attained twenty-five years of age. Before this time, for some purposes they had what was termed *venia ætatis*, or as it might be rendered the grace or favour of age. The Judges seem to have granted this grace on account of the inconvenience in some instances of so late a majority. (Lord Mackenzie, pp. 67 and 68.)

(r) *Sui juris fieri* is equivalent to *in suam tutelam et in suam potestatem perrenire*. (L. 50. pr. sec. 4. D. 32.) A man who has no ancestors living to exercise the *potestas* over him is *sui juris*. A man to whom a tutor or guardian was given must be *sui juris*. The tutor fills up as it were

the gap which minority makes in the *persona* of a man entitled to be in his own *potestas*. Adult age commenced for females at twelve years of age, for males at fourteen. The Hindoos have made it a religious obligation that children should marry at this age; but after the marriage the woman frequently returns for a year to her friends before the consummation of the nuptials, and there seems to be little or no doubt that the Hindoo and Roman law proceeded from the same source. A person is said to be *sui juris* when he is subjected to no private or family power. Such persons are termed either *patres familiarum* or *matres familiarum*, since they may have others under their *potestas*. Sometimes such a person is said to be *caput liberum* (sec. 1. i. de tut. i. 13) or *sui arbitrii* (l. 22. Dig. de ritu nupt. 23. 2). (See Mühlenbruch's Inst. sec. 63. pp. 99, 91.)

49. Sed rursus earum personarum, quæ alieno juri subjectæ sunt, aliæ in potestate, aliæ in manu, aliæ in mancipio sunt.

49. But again of those persons who are subjected *alieno juri*, some are under the *potestas*, some in *manu*, others in *mancipio*.

50. Videamus nunc de iis quæ alieno juri subjectæ sint: si cognoverimus quæ istæ personæ sint, simul intellegemus quæ sui juris sint.

50. Let us now consider those who are subjected *alieno juri*, for if we have ascertained who these are we shall at the same time discover those who are *sui juris*.

51. Ac prius dispiciamus de iis qui in aliena potestate sunt.

51. And first let us treat of those who are under the *potestas* of another.

JUST. i. 8.

52. In potestate itaque sunt servi dominorum. Quæ quidem potestas juris gentium est: nam apud omnes peræque gentes animadvertere possumus dominis in servos vitæ necisque potestatem esse. Et quodcumque per servum acquiritur, id domino acquiritur.

52. Now slaves are under the *potestas* of their masters which *potestas* is derived from the *jus gentium*, for among all nations without distinction it may be observed that masters have the power of life and death over their slaves, and also whatever is acquired by the slave belongs to his master. (S)

JUST. i. 8. 1.

(s) By the *lex Cornelia* (B.C. 82) killing a slave was punishable as homicide, and by the *lex Petronica* (l. 11. s. 2. Dig. ad leg. Corn. 48. 8) a master was forbidden "*suo arbitrio*" to expose a slave to fight with wild beasts. Subsequent legislation still further restrained the power of the master. (Confer. C. 9. 14. and ad legem Aquilam, D. 9. 2.)

53. Sed hoc tempore neque civibus Romanis, nec ullis aliis hominibus qui sub imperio populi Romanisunt, licet supra modum et sine causa in servos suos sævire. Nam ex constitutione *sacratissimi* Imperatoris Antonini qui sine causa servum suum occiderit, non minus teneri jubetur, quam qui alienum servum occiderit. Sed et major quoque asperitas dominorum per ejusdem Principis constitutionem coercetur. Nam consultus a quibusdam Præsilibus provinciarum de his servis, qui ad fana deorum vel ad statuas Principum confugiunt, præcepit, ut si intolerabilis videatur dominorum sævitia, cogantur servos suos vendere. Et utrumque recte fit; male enim nostro jure uti non debemus: qua ratione et prodigis interdicatur bonorum suorum administratio.

53. But at the present day neither Roman citizens, nor any other persons under the dominion of the Roman people dare punish their slaves with excess and without legally recognized ground (*sine causa*): for by a constitution of the most sacred Emperor (t) Antoninus, he who without cause kills his slave, is liable in the same manner as one who has killed the slave of another. But also excessive harshness of masters is restrained by a constitution of the same emperor. For, when consulted by certain governors of provinces concerning those slaves, who fly for refuge to places dedicated to the Gods, or to the statues of the Emperors, he decided that if the severity of masters should appear to be beyond bounds, they might be compelled to sell their slaves: and both modifications of the rule are good, for we ought not to make a bad use of our right. In accordance with which principle also the management of their property is prohibited to spendthrifts. (*prodigis*) (u)

JUST. i. 8. 2.

(t) *Sacratissimi Imperatoris Antonini*. In the second commentary of Gaius, Antonine is called *divus Antoninus*, as all those who have preceded him are called. In this place the epithet "most sacred Emperor Antoninus" has led to the supposition that Gaius wrote the first commentary of his Institutes towards the close of the reign of Antoninus, and that Antoninus was dead when he wrote the second book of this valuable work.

(u) This section is worthy of attention as it clearly shows that masters were to treat their slaves with consideration and mercy. Slaves were not to be punished *sine causa*—that is without some good grounds "*legibus cognita*." The father and the master under the Roman law had the *jus vitæ et necis* over both children and slaves, but it was a power rarely exercised, and rather possessed *in terrorem* than actually employed. As the Jews had their cities of refuge for the man-slayer, so had the Romans a shelter for the slave from the rage and fury of an incensed master. The slave as the text proves might resort for protection *ad fana deorum* or *ad statuas principum*, or the law stepped in and compelled the original master to sell his slave. The Roman law of slavery ever regarded the amelioration of the unhappy serf's condition and cast a longing eye to freedom as the normal and proper condition of all mankind. What a reproach is this upon the conduct of those who, under the pretext of martial law, have so recently in the island of Jamaica punished *freed* blacks in a manner that must be pronounced as an outrage upon all law human and divine. A voice of stern reprobation against such worse than brutal cruelties, reaches us from the *heathen* but withal humane and philosophic age of the Antonines.

51. Ceterum cum apud cives Romanos duplex sit dominium, (nam vel in bonis vel ex jure Quiritium vel ex utroque juri cujusque servus esse intellegitur), ita demum servum in potestate domini esse dicemus, si in bonis ejus sit, etiamsi simul ex jure Quiritium ejusdem non sit, nam qui nudum jus Quiritium in servo habet, is potestatem habere non intellegitur.

54. Moreover, since with Roman citizens *dominium* is of a two-fold character, a slave is regarded as held either *in bonis* or *ex jure Quiritium*; or according to both the *jus gentium* and the *jus civile*. Thus we say that a slave is under the *potestas* of his master when he is held *in bonis*, even though he is not held at the same time *ex jure Quiritium*, for he who has the mere *jus Quiritium* in his slave, is not understood to possess the *potestas*. (v)

(c) *Nudum jus Quiritium*. This resembled our so-called 'legal estate,' as contrasted with the 'equitable estate.'

If a Roman had both the legal and equitable estates in a slave, that slave was under the *potestas* of the owner. If he had the "equitable estate," the slave was still under the *potestas* of the equitable owner; but if the mere "legal estate" was in the master (*nudum jus Quiritium*) then according to Gaius the slave was not under the *potestas* of the mere legal owner.

55. Item in potestate nostra sunt liberi nostri quos justis nuptiis creavimus. Quod jus proprium civium Romanorum est. Fere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus. Idque divus Hadrianus edicto quod proposuit de his, qui sibi liberisque suis ab eo civitatem Romanam petebant, significavit. Nec me praeterit Galatarum gentem credere, in potestatem parentum liberos esse.

55. Also our children begotten in lawful marriage, (*justis nuptiis*), are under our *potestas*, which right (*jus*) is peculiar to the Roman people; for scarcely any other people have such a *potestas* over their children as we have. This also has Hadrian (*divus*) declared in an edict, which he propounded in regard to those who sought from him, both for themselves and their children, the Roman *civitas*. (*w*) Nor does it escape me that the people of Galatia (*x*) believe their children to be under the *potestas* of their parents.

JUST. i. 9.

(*w*) The *patria potestas* was possessed only by the *paterfamilias* who had legitimate children either by birth or adoption. "Non tantum naturales liberi in potestate parentum sunt, sed etiam adoptivi." (Ulp. Frag. viii. sec. 1.) By a legal fiction adopted children were considered in the same relation to the *pater* as the *liberi naturales*. Only those could exercise the *potestas* who were *sui juris*. The consequence of this was that all children legitimately born to a man, and after the time of Constantine all those made legitimate *per subsequens matrimonium*, all legally adopted children, all grand-children or descendants subsequently born to a *filius familias* by his wife, were under the *potestas* of the head of the family. Grand-children are not under the *potestas* of their own father whilst the paternal grandfather is alive, and the agnate band remains unbroken. It

must also be observed that the children of a daughter are never born under the *potestas* of their maternal grandfather, as they belong to their father's *familia*. Hence the maxim is *mulier finis familiae*, for the moment a woman marries she is transferred to another family. All who do not belong to the family of their father, if they have been conceived in lawful wedlock, are *sui juris* or *patres familias*, either at the period of their birth, since the father may be dead, or from the moment of their emancipation, or from the moment of the death of their last male paternal ascendant. (See Domenget, pp 35, et seq.)

(x) *Galatarum gentem credere in potestatem parentum liberos esse*. The apostle Paul in his epistle to these people, seems to refer to this peculiar institution as understood by the Galatians. He says: "Now I say, that the heir, as long as he is a child, differeth nothing from a servant"—that is, they were both under the *potestas*—"though he be lord of all; but is under tutors and governors until the time appointed of the father." (Gal. iv. 1. 2; see also Alford's Greek Test. in loco.)

56. *Habent autem in potestate liberos cives Romani*, (y) si cives Romanas uxores duxerint, vel etiam Latinas peregrinasve cum quibus conubium habeant: cum enim conubium id efficiat, ut liberi patris condicionem sequantur, evenit ut non *solum* cives Romani fiant, set *et* in potestate patris sint.

56. Roman citizens have their children under their *potestas*, if as citizens they have married Roman women, or even Latinæ or Peregrinæ, with whom they have *conubium*: (z) for the *conubium* thus operates, that the children follow the legal condition of their father; hence it comes to pass that they become not only Roman citizens, but they are also under the *potestas* of the father.

(y) *Habent autem in potestate liberos cives Romani*. These words are supplied by Goesehen, as the MS. is imperfect in this part. All the subsequent editors seem to have followed him. Huschke, a writer on Gaius, remarkable for his acuteness and great knowledge of the Roman law, has demonstrated that this cannot be the correct emendation,

and for the following reasons: the words supplied at the beginning of the section fill only a line, whilst in the MS. there are at least two lines wanting. It does not moreover satisfy the sense, for one seems to expect in this place—since Gaius has spoken in the previous section of the *patria potestas* (*in potestate nostra sunt liberi, quos ex justis nuptiis procreavimus*)—rather a definition of *justæ nuptiæ*. See Ulp. Frag. v. 1. 2, where it will be found that Ulpian having spoken first of the *potestas*, then goes on afterwards to speak of *matrimonium*: “In potestate sunt liberi parentum ex justo matrimonio nati. Justum matrimonium est, si inter eos qui nuptias contrahunt conubium sit, &c.” (Conf. also Epit. i. 3. pr.) The words usually supplied are not sufficiently definite, as they might be taken to include other children of the woman, as well as those she might bear after the supposed marriage. Huschke thinks that the following may be the correct reading of Gaius: “Justas autem nuptias contraxisse liberosque iis procreatos in potestate habere cives Romani ita intelliguntur, si conubium intervenerit, hoc est, si cives Romanas, &c.” The words suggested as an emendation fill more than two lines, but the space left by the copyist seems to be manifestly arbitrary. (See Huschke pp. 1. 2.)

(2) *Conubium*. A legally recognized marriage (*justæ nuptiæ*) could take place with Roman citizens when the husband possessed the *connubium*. The *connubium* gave the right to contract a valid marriage, such a marriage as entitled the parties contracting it to all possible family rights. Thus, Ulp. says, v. 3, “conubium est uxoris jure ducendæ facultas.” The *connubium* law which passed in the year 309 A.U.C. gave the *connubium* to the plebs.

“Roman men citizens,” says Ulpian, “have *connubium* with Roman women citizens (*Romanæ cives*); but with *Latinæ* and *peregrinæ* only in those cases where it has been permitted. With slaves there is no *connubium*.” Except in certain cases there was only *connubium* between Roman citizens. At one period of the Republic, there was no con-

nubium between the patricians and the plebeians. As early as 445 B.C. the *lex Canuleia* invested the plebs with the *jus connubii*. Livy gives a vivid account of the passing of this law, and of the opposition given to it by the *patres*. This account occupies the first five chapters of his fourth book. There was no *connubium* between parent and child, whether the relation was natural or by adoption. None between brothers and sisters, whether of the whole or the half blood: but a man might marry a sister by adoption after her emancipation, or after his own. It became legal, as Mr. Long correctly observes, to marry a brother's daughter, only after Claudius had set the example by marrying Agrippina; but the rule was not carried further than the example; and in the time of Gaius it remained unlawful for a man to marry his sister's daughter. (Livy iv. caps. 1—5; Tacit. Ann. xii. 5; Suet. Claud. 26; Diet. Gr. et Rom. Antiq. Art. Marriage; Cic. Repub. ii. 37; Ulp. Frag. “de his quī in potestate sunt;” v. sec. 2, seq.)

57. Unde et veteranis quibusdam concedi solet principalibus constitutionibus *connubium* cum his Latinis peregrinisve quas primas post missionem uxores duxerint, et qui ex eo matrimonio nascuntur, et cives Romani et in potestatem parentum fiunt.

57. Whence also the constitutions of our princes often concede to certain veterans the *connubium* with those Latinæ or peregrinæ whom they have married immediately after their dismissal from the public service; and those who are born from such marriage become Roman citizens, and are under the *potestas* of their parents. (a)

(a) “*In potestatem parentum fiunt.*” The term *parentum* is here employed, not for parents generally, but for what may be technically expressed as the “agnate ascendants.” The agnate relations are in the expressive words of Gaius, “*sunt agnati, qui per virilis sexus personas cognatione juncti sunt, quasi a patre cognati.*” (L. 7. D. 26. 4.) This agnatic band or bond pervades the whole system of Roman jurisprudence.

58. *Sciendum autem est non omnes nobis uxores ducere licere: nam a quarundam nuptiis abstinere debemus.*

58. But it is to be observed that it is not permitted us to marry whom we please, for we ought to abstain from certain marriages. (b)

JUST. i. 10. 1.

(b) The effect of an illegal marriage is well put by Ulpian (Frag. v. 7) "*Si quis eam quam non licet, uxorem duxerit, incestum matrimonium contrahit, ideoque liberi in potestate ejus non fiunt, sed quasi vulgo concepti spurii sunt.*"

59. Inter eas enim personas quæ parentum liberorumve locum inter se optinent, nuptiæ contrahi non possunt, nec inter eas conubium est, velut inter patrem et filiam, vel matrem et filium, vel avum et neptem: et si tales personæ inter se coierint, nefarias atque incestas nuptias contraxisse dicuntur. Et hæc adeo ita sunt, ut quamvis per adoptionem parentum liberorumve loco sibi esse cœperint, non possint inter se matrimonio conjungi, in tantum, ut et dissoluta adoptione idem juris maneat: itaque eam quæ nobis adoptione filiæ aut neptis loco esse coeperit non poterimus uxorem ducere, quamvis eam emancipaverimus.

59. Marriage cannot be contracted between persons standing to each other in the relation of ascendant and descendant, for there exists no connubium between them; as for example between father and daughter, or a mother and her son, a grandfather and his granddaughter; and, if such persons come together, they are said to have contracted a wicked and incestuous marriage. This is so far the case that ascendants and descendants, who are only so by adoption, cannot intermarry; and even after the adoption has been dissolved, the same prohibition remains; therefore we cannot marry a woman who has been either our daughter or granddaughter by adoption, although we have emancipated her.

JUST. i. 10. 1.

60. Inter eas quoque personas quæ ex transverso gradu cognatione junguntur est quædam similis observatio, sed non tanta.

60. There are also similar restrictions, though not so extensive, on marriage between persons who are connected by collateral ties.

JUST. i. 10. 2.

61. Sane inter fratrem et sororem prohibitæ sunt nuptiæ, sive eodem patre eademque matre nati fuerint, sive alterutro eorum. Sed si qua per adoptionem soror mihi esse cœperit, quamdiu quidem constat adoptio, sane inter me et eam nuptiæ non possunt consistere; cum vero per emancipationem adoptio dissoluta sit,

61. A brother and sister are certainly forbidden to marry, if they are the children of the same father and mother, or of one of them only. (c) But if a woman becomes my sister by adoption, so long as the adoption subsists, marriage is prohibited between us; when however the adoption is destroyed by emancipation, I can

potero eam uxorem ducere; set ut si ego emancipatus fuero, nihil impedimento erit nuptiis.

marry her; moreover also, if I have been emancipated myself, there is no impediment to the marriage. (*d*)

(*c*) "*Sive alterutro eorum.*" Brothers and sisters are forbidden to marry, whether they be of the full or the half blood.

(*d*) What Gaius intends to be understood is this: that the bond of adoption must be unloosened. If either the adoptive brother or the adoptive sister is emancipated the marriage may take place. The bond is effectually severed when either the one or the other ceases to sustain the family relationship.

62. Fratr^{is} filiam uxorem ducere licet: idque primum in usum venit, cum divus Claudius Agrippinam, fratris sui filiam, uxorem duxisset. Sororis vero filiam uxorem ducere non licet. Et hæc ita principalibus constitutionibus significantur. Item amitam et materteram uxorem ducere non licet.

62. It is permitted to marry the daughter of a brother: this first began when Claudius had married Agrippina, his brother's daughter: (*e*) on the other hand it is not permitted to marry the daughter of a sister. And this is determined by imperial constitutions. Again, marriage is prohibited with either a paternal (amitam) or maternal (materteram) aunt.

JUST. I. 10. 3—5.

(*e*) Tacitus in his *Annales* notes in emphatic language this illicit connection. He says—"C. Pompeio, Q. Ver-
rannio coss pactum inter Claudium et Agrippinam matrimonium. Jam fama, jam amore illicito firmabatur: nec dum celebrare sollemnia nuptiarum audebant, nullo exemplo deductæ in domum patruⁱ fratr^{is} filiæ. Quin et incestum, ac si sperneretur, ne in malum publicum erumperet, metuebatur." (*Lib.* XII. c. 5. See also *Suet.* in *Claud.* 26. *Ulp.* v. 6.)

63. Item eam quæ nobis quondam socrus aut nurus aut privigna aut noverca fuit. Ideo autem diximus "quondam," quia si adhuc constant eæ nuptiæ per quas talis adfinitas quæsitæ est, alia ratione inter nos

63. Nor can a man marry his former mother-in-law, or daughter-in-law, or his step-daughter or step-mother. We have said his "former" because during the existence of the marriage through which such an affi-

nuptiæ esse non possunt, quia neque eadem duobus nupta esse potest, neque idem duas uxores habere.

nity exists, another reason prevents the marriage, because the same woman cannot at the same time have two husbands, nor the same man have two wives. (f)

JUST. i. 10. 6.

(f) The general rule of prohibition in the direct line is stated in section 59, and resembles that which prevails in English law (Stephens' Blackstone, vol. ii. page 259) with however this important addition—that *adoption* was regarded as equally a ground of prohibition with natural relationship, and acted as a barrier against marriage between ascendants and descendants, not only during the continuance of the tie, but also after it had been dissolved. In secs. 61-63 Gaius notes the prohibitions which arose from collateral relationship, both of consanguinity and affinity; these were subsequently extended (see Just. i. 10. 3—9), and as regards *consanguinei* the rule prevailed, —“That marriage was permitted between collaterals, only when both were two degrees at least from the common ancestor.” (Domenget, Gaius in loco.) In our English law the prohibition of marriage between collaterals extends to persons related to each other in the *third* degree, and includes both *affines* and *consanguinei*. Hence the marriage of a great aunt, though forbidden by the civil law, is permitted by the English law. The marriages of first cousins were at different periods of Roman history forbidden and allowed, till the time of Justinian, who legalized them (Just. i. 10. 4); while the marriage of a man with his deceased brother's wife, or his deceased wife's sister, after having been allowed, was forbidden by Valentinian, Theodosius, and Arcadius. (C. 5. 5.) “Fratris uxorem ducendi, vel duabus sororibus conjungendi penitus licentiam submovemus.”

64. Ergo si quis nefarias atque incestas nuptias contraxerit, neque uxorem habere videtur, neque liberos.

64. Therefore if any one has contracted a wicked and incestuous marriage, he is considered as having

Hi enim qui ex eo coitu nascuntur, matrem quidem habere videntur, patrem vero non utique: nec ob id in potestate ejus sunt, sed quales sunt ii quos mater vulgo concepit. Nam nec hi patrem habere omnino intelliguntur, cum his etiam incertus sit; unde solent spurii filii appellari, vel a Græca voce quasi σποράδην concepti, vel quasi sine patre filii.

neither wife nor children: those who are born of this union, are considered as having a mother but not as having a father, and in consequence of this they are not under his *potestas*; but are in the condition of children conceived in prostitution, who are looked upon as having no father, because it is uncertain who their father is; therefore it is the custom to call these children *spurii*, either from a Greek word meaning “scatteredly,” (*g*) or as being *sine patre*, without a father.

JUST. i. 10. 12.

(*g*) σποράδην is adverbial form connected with σπορά, from σπείρω I sow. Every child born from illicit intercourse was thus called *spurius*, and could not be made legitimate because he had no father known to the law. (Dig. i. 5. 23.)

65. *Aliquando autem evenit, ut liberi qui statim ut nati sunt parentum in potestate non fiant, ii postea tamen redigantur in potestatem.*

65. It sometimes happens, that children who at their birth were not in the *potestas* of their relatives, are nevertheless brought under it afterwards.

JUST. i. 10. 13.

66. *Itaque si Latinus ex lege Ælia Sentia uxore ducta filium procreaverit, aut Latinum ex Latina, aut civem Romanum ex cive Romana, non habebit eum in potestate at causa probata civitatem Romanam consequitur cum filio: simul ergo eum in potestate sua habere incipit.*

66 Therefore if a Latinus, according to the lex Ælia Sentia, has married and begotten a son, the child is a Latinus if his mother is a Latin woman, or a Roman citizen if his mother is a Roman woman; he will not be under the *potestas* of his father; when, however, the father has shown cause, (*h*) (*causa probata*,) he then attains to the Roman citizenship with his son, and commences from this time to have his son under his *potestas*.

(*h*) The words in italics in the text are from the conjecture of Huschke. “Kritik und zum Verständniss,” p. 2, Goeschen adds, “Sententiæ certe hæc est: filio anniculo facto et causa probata Latinum, præterquam quod civitatem

adipiscatur tam ipse quam uxor ejus et filius, si ejusdem condicionis sint, incipere etiam in potestate habere filium."

By sec. 29 of the present book it appears that it sufficed for a Latinus to marry a Roman woman, or even a Latin woman with certain formalities, and to have a son of a year old (*anniculus*) in order to found a claim for the father, the mother and the child, to the Roman *civitas*. Still the child born, the *anniculus*, until the *causa probata* might be a Roman citizen, but not under the *potestas* of the father. When, however, the father had shown cause, the child would be brought under his *potestas*.

67. Item si civis Romanus Latinam aut peregrinam uxorem duxerit per ignorantiam, cum eam civem Romanam esse crederet, et filiam procreaverit, hic non est in potestate, quia ne quidem civis Romanus est, sed aut Latinus aut peregrinus, id est ejus condicionis cujus et mater fuerit, quia non aliter quisquam ad patris condicionem accedit, quam si inter patrem et matrem ejus connubium sit: sed ex senatus-consulto permittitur causam erroris probare, et ita uxor quoque et filius ad civitatem Romanam perveniunt, et ex eo tempore incipit filius in potestate patris esse. Idem juris est, si eam per ignorantiam uxorem duxerit quæ dediticiorum numero est, nisi quod uxor non fit civis Romana.

67. Also if a Roman citizen has married a Latin woman, or a peregrina, through ignorance, supposing her to be a Roman citizen, and has had a son by her, this son is not under his *potestas*, because he is not even a Roman citizen, but is either a Latinus or a peregrinus, that is to say, he follows the condition of his mother, because no one attains to the condition of his father, except when the connubium exists between his father and mother: but by a senatus-consultum the father is permitted to furnish proof of his error, and by this means both the wife and the son obtain the Roman *civitas*; from this time the son is brought under the *potestas* of his father. The same rule of law prevails if through ignorance he has married one of the dediticii, only that the woman does not become a Roman citizen. (i)

(i) In the present section we see that a more rigorous condition was exacted from the Roman citizen, who having married a Latin woman wished to obtain for her and her child the rights of Roman citizenship. The father must prove his *bona fides* showing that he had contracted the marriage in error, supposing his wife to be a Roman citizen.

The same favour was also accorded in the case when in error a Roman had married a peregrina or even a woman belonging to the class of the *dediticii*, only that in the last instance the woman would not become a Roman citizen. It has been asked why was this difference made between the *Latinus* and the Roman citizen. It was simply with a view to favour marriage that the privilege of becoming a Roman citizen was granted to the *Latinus* on conditions so favourable; whilst a marriage contracted between a Roman and a Latin woman or a peregrina was only deemed valid and merited the same favour by virtue of the good faith of the parties themselves. When a *Latinus* took a wife with the solemnities indicated in sec. 29, whether she were a Roman citizen or a Latin woman, a valid marriage was contracted which drew with it as a natural result certain privileges; whilst a marriage contracted between a Roman citizen and a Latin woman or a peregrina was invalid, and obtained the same privileges only by virtue of the good faith of the contracting parties. This view is confirmed by what is stated in sec. 69 and following. When a *Latinus* had married a peregrina thinking her to be a Latin woman, or when a Latin woman had married a peregrinus taking him for a Latin, there was required the *erroris probatio* before the *civitas* could be acquired. (See Domenet pp. 20. 21. 42 et seq, Ganz. 125 et seq. *Instituzioni di Gajus*, notes on secs. 66. 67. 69.)

Ganz is of opinion that the *senatus-consultum* which introduced the *erroris causæ probatio* is no other than that mentioned in the 31st section, *Senatus-consultum Pegaso et Pusione Coss.*, and that it must be regarded as an extension of the *lex Ælia Sentia*. (Ganz, p. 125.) This *senatus-consultum* was passed in the time of *Vespasian*. G. Long also coincides in this opinion.

68. Item si civis Romana per errorem nupta sit peregrino tamquam civi Romano, permittitur ei causam erroris probare, et ita filius quoque

68. Also if a Roman woman have married a peregrinus in error, supposing him to be a Roman citizen, she is permitted to show cause respecting

et maritus ad civitatem Romanam perveniunt, et æque simul incipit filius in potestate patris esse. Idem juris est si peregrino tamquam Latino ex lege Ælia Sentia nupta sit; nam et de hoc specialiter senatusconsulto cavetur. Idem juris est aliquatenus, si ei qui dediticiorum numero est, tamquam civi Romano aut Latino e lege Ælia Sentia nupta sit: nisi quod scilicet qui dediticiorum numero est, in sua condicione permanet, et ideo filius, quamvis fiat civis Romanus, in potestatem patris non redigitur.

her mistake, and thus both her son and her husband attain to the Roman *civitas*, whilst the son also from this time is brought under the *potestas* of his father. The same rule of law applies if she has married in accordance with the lex Ælia Sentia a peregrinus supposing him to be a Latinus; for by a senatus-consultum this case is specially provided for. (j) The same rule of law to a certain extent applies if she has married, in accordance with the lex Ælia Sentia, one belonging to the dediticii, supposing him to be a Roman or a Latinus; except that the dediticius remains in his original condition, and thus his son, although he becomes a Roman citizen, is not brought under the *potestas* of his father.

(j) The lex Ælia Sentia applied specially to the case of marriage between a Roman woman and a Latinus. Such a marriage, as we have seen in sec. 29, when it had been contracted with certain forms, entitled the Latinus to claim both for himself and his child born of the marriage, if the latter had attained the age of one year, the rights of citizenship. We learn from the present section, that a peregrinus in like manner attained to the *civitas*, if he had married a Roman woman, and if she had borne a son to him, provided that the marriage had been contracted in error, the woman supposing the man to be a Latinus. So also if the woman had married even one of the dediticii, subject to the restrictions contained in the concluding part of the section, the child might attain to the *civitas*. It seems at the time of the passing of the lex Ælia Sentia and subsequently to have been the policy of Rome to increase her citizens when she could safely do so without invading her laws or weakening her dependencies.

69. Item si Latina peregrino, quem Latinum esse crederet, nupseret, potest ex *senatusconsulto* filio nato

69. Also if a Latin woman has married a peregrinus, whom she took to be a Latinus, she is entitled,

causam erroris probare, et ita omnes fiunt cives Romani, et filius in potestate patris esse incipit.

70. *Idem juris omnino est, si Latinus per errorem peregrinam quasi Latinam aut civem Romanam e lege Ælia Sentia uxorem duxerit.*

71. *Præterea si civis Romanus, qui se credidisset Latinum, duxisset Latinam, permittitur ei filio nato erroris causam probare, tanquam si ex lege Ælia Sentia uxorem duxisset. Item his qui licet cives Romani essent, peregrinos se esse credidissent et peregrinas uxores duxissent, permittitur ex senatusconsulto filio nato causam erroris probare: quo facto peregrina uxor civis Romana fit et filius quoque ita non solum ad civitatem Romanam pervenit, sed etiam in potestatem patris redigitur.*

according to the *senatus-consultum*, after the birth of a son to exhibit proof of her error; thus they all become Roman citizens, and the son is subjected to the *potestas* of his father.

70. The same rule of law applies in every respect, if a Latinus has married in accordance with the *lex Ælia Sentia* a peregrina, erroneously supposing her to be a Latina or a Roman woman.

71. Moreover when a Roman citizen supposing himself to be a Latinus has married a Latin woman, it is permitted him after the birth of a son, to show proof of his error just as if he had married in accordance with the *lex Ælia Sentia*. It is also permitted to those, who being Roman citizens thought they were peregrini, and have married peregrinæ, in accordance with the *senatus-consultum*, upon the birth of a son to exhibit proof of their mistake; thereupon the peregrina becomes a Roman citizen and the son attains not only to the Roman *civitas*, but is brought under the *potestas* of his father. (*k*)

(*k*) Whilst the *anniculi probatio* was introduced with the immediate object of opening up the *civitas* to the Latinus, the *erroris probatio* had a much larger scope and tendency. Not only could the Latinus, but even the peregrinus, by the means of it, attain to the Roman citizenship.

Before the discovery of the manuscript of Gaius almost all that was known upon this subject was derived from a very imperfect passage quoted below from the writings of Ulpian—(Ulp. tit. vii. s. 4.)—a passage almost universally misunderstood. Through Gaius, fortunately, we possess far more accurate information upon this obscure subject. In sec. 65 Gaius explains that in many cases children are not at the time of their birth under the *patria potestas*, but are brought

into this legal relation at a subsequent period. In sec. 66 he introduces as a note his remarks on the *anniculi probatio*, and in sec. 67 and the following sections he sets forth what may be stated compendiously as follows:—

1. When a Roman citizen has in mistake married a Latina, peregrina or dediticia, under the supposition that he was marrying a Roman citizen, the children of such a marriage in the nature of things could not stand under the *patria potestas*, and the child had no rights of citizenship. “Sed ex senatusconsulto permittitur, causam erroris probare, et ita uxor quoque et filius ad civitatem Romanum perveniunt, et ex eo tempore incipit filius in potestate esse.” The exception to this rule was when the woman was a dediticia, in which case she could of course never attain to citizenship.

2. Again, if a Roman woman had married a peregrinus or a dediticius, whom she had taken for a Roman or for a Latinus, supposing that she in the last case had observed the formalities of the *lex Ælia Sentia*, the same rule of law as that contained in No. 1. would apply. If however she had married a dediticius it is manifest that he could never become a Roman citizen nor exercise the *potestas*. (Sec. 68.)

3. The same principle applied when a Latina had married a peregrinus, whom she has mistaken for a Latinus. (Sec. 69.)

4. It is the same when a Latinus has married a peregrina in the opinion that she was a Latina or a Roman citizen, having duly observed the formalities of the *lex Ælia Sentia*. (Sec. 70.)

5. In addition to the above cases we have the following: when a Roman citizen, who has taken himself for a Latinus marries a Latin woman; and also when he, in the belief that he was a peregrinus, married a woman who was a peregrina. (Sec. 71.)

The above cases as put by Gaius, should be compared with the passage of Ulpian already referred to. “In potestate parentum sunt etiam hi liberi, quorum causa probata est, per errorem contracto matrimonio inter disparis conditionis

personas : nam sive civis Romanus Latinam aut peregrinam, vel eam, quæ dediticiorum numero est, quasi per ignorantiam uxorem duxerit, sive civis Romana per errorem peregrino vel ei, qui dediticiorum numero est, aut etiam quasi Latino ex lege Ælia Sentia nupta fuerit, causa probata, civitas redditur tam liberis, quam parentibus, præter eos, qui dediticiorum numero sunt; et ex eo fiunt in potestate parentum liberi." (Ulp. Frag. tit. vii. sec. 4.) That the text of the foregoing extract from Ulpian is corrupt scarcely admits of a doubt. This passage, till the discovery of Gaius, gave rise to the prevailing opinion that the *erroris probatio* was introduced by the lex Ælia Sentia. Such an opinion is now quite given up. We learn from Gaius in the most distinct manner that the *erroris probatio* was introduced not by the lex Ælia but by a senatus-consultum. (Sec. 68.)

The correction which is made to the passage of Ulpian now received by most jurists is the following: "sive civis Romana per errorem peregrino, vel ei, qui dediticiorum numero est, *quasi civi Romano* aut etiam quasi Latino ex lege Ælia Sentia nupta fuerit."

72. Quæcumque de filio esse diximus, eadem et de filia dicta intellegemus.

72. All that we have said in respect to a son, we wish also to be understood as applying equally to a daughter. (l)

(l) That is to say, in the cases above referred to, a *daughter* would pass into the *potestas* of the father in the same manner as a son.

73. Et quantum ad erroris causam probandam attinet, nihil interest cuius ætatis filius sive filia sit . . . Latinus . . . qui . . . (m) nisi minor anniculo sit filius filiave, causa probari non potest. Nec me præterit in aliquo rescripto divi Hadriani ita esse constitutum, tanquam quod ad erroris quoque causam probandam . . . Imperator . . . tuendam dedit.

73. As far as concerns the proof of the cause of error, it does not matter what may be the age of the son or the daughter. . . . unless, if the son or the daughter be less than a year old, the proof cannot be put in; nor does it escape me, that in a certain rescript of Hadrian it is thus determined, that in order to put in the proof of error, (the son must be a year old.)

(*m*) Goeschen supplies “ex lege Ælia Sentia” as from sec. 29. and would read “in erroris causa probanda nihil interesse ejus ætatis filius sit; ex lege Ælia Sentia autem causam probari non posse si minor anniculo sit filius.”

74. *Item peregrino . . . uxorem duxisset et filio nato alias civitatem Romanam consecutus esset, deinde cum quæreretur an causam probare posset, rescripsit Imperator Antoninus perinde posse eum causam probare, atque si peregrinus mansisset. Ex quo colligimus etiam peregrinum causam probare posse.*

74. Further as to a peregrinus who has married a Roman citizen, and who after the birth of a son, had attained in some other way the Roman *civitas*, the question was raised whether he could show cause of error; the Emperor Antoninus in a rescript affirms that he can, just as well as if he had remained a peregrinus; from which we have concluded that a peregrinus was admitted to give proof of his error. (*n*) .

(*n*) From what is here stated, we see that some of the privileges of the *lex Ælia Sentia* were extended to a peregrinus by a rescript of Hadrian as interpreted by the juriconsulti, and a peregrinus would be permitted to show cause though not able to plead the *lex Ælia Sentia*.

75. *Ex iis quæ diximus apparet . . . errore . . . peregrinus . . . quidem . . . errorem . . . matrimonium . . . ea quæ superius . . . nullus error inter- venerit . . . nullo casu . . . (o)*

(*o*) This section is quite illegible in the manuscript.

76. . . . uxorem duxerit, si- cut *supra quoque* dicimus, *justum* matrimonium contrahi et tunc ex iis *qui nascitur*, civis Romanus est et in potestate patris erit.

76. He who has married in the manner we have stated above, contracts a legal marriage, and then the child which is born from this union is a Roman citizen, and will be under the *patria potestas*. (*p*)

(*p*) Two lines are wanting at the commencement of this section; “*supra*” appears to refer to sec. 56; and the concluding clause justifies Goeschen’s conjecture that Gaius is here speaking of a Roman citizen who has married a peregrina with whom the *connubium* exists.

77. Itaque si civis Romana peregrino nupserit, is qui nascitur, licet omni modo peregrinus sit, tamen interueniente conubio justus filius est, tamquam (q) si ex peregrina cumprocreasset. Hoc tamen tempore a senatusconsulto quod auctore (r) divo Hadriano factum est, etsi non fuerit conubium inter civem Romanam et peregrinum, qui nascitur justus patris filius est.

77. Therefore when a Roman woman has married a peregrinus their son, though in every case a peregrinus, yet by the intervention of the conubium he is a legitimate son, as if he had been born of a peregrina; but at the present time, in consequence of a senatus-consultum of the time of Hadrian, although the conubium did not exist between the Roman woman and the peregrinus, the child who is born is a legally acknowledged son of his father.

(q) These words are added by Lachmann after comparison of this section with sec. 92. The senatus-consultum of Hadrian here makes an exception to the general rule that without the conubium the child follows the condition of the mother.

(r) *Auctore divo Hadriano*. The terms both *auctor* and *suasor* are used in Roman law, though the former word is of more frequent occurrence. *Auctor* differs from *suasor* in this, that the latter only advises, but the former supports his advice by his influence, his character, and sometimes by force: with *suasor* respect is only had to what is said, but with *auctor* there is always the idea of *completion*, *dignity*, and *power*. The word contains the same elements as *augeo*, and signifies generally "one who enlarges, confirms or gives to a thing its completeness and efficient form." All the technical significations of the word are derived from this fundamental notion. It is in this way that the word comes to be used for one who originates or proposes a thing. Words derived from this root *aug* play an important part in Roman law, and are always used to denote an additive or completing character, showing, so to speak, that a gap had to be filled up. (See Instit. Rom. Law. pp. 23 et seq.) The word *auctor* when used with a *lex* or *senatus-consultum* often points out the person who originates. In the time of Gaius the term *auctor* was said of the emperor (princeps) who recommended anything to the senate, and

on which recommendation that body passed a *senatus-consultum*. Thus Ulpian says:—"Quum hic status esset donationum inter virum et uxorem, quem antea retulimus, Imperator noster Antoninus Augustus ante excessum divi Severi patris sui oratione in Senatu habita *auctor fuit Senatui censendi*." (L. 32 pr. D. 24. 1.)

Again it is said:—"amplissimus ordo, *auctore divo Marco, censuit*" (L. 5. C. 5. 62.) When the word *auctor* is applied to him who recommends but does not originate a measure, it is equivalent to *suasor*. Cicero sometimes uses both words in the same sentence but always keeps their meaning distinct. (Liv. VI. 36. Cic. pro Dom. c. 30. Sueton. Vesp. 2. Cic. ad Att. I. 19. Brutus 25. 27. Off. 3. 31. Diet. Gr. et Rom. Ant. in verb. auctor. Hermann's Handlexicon. h. v.)

78. Quod autem diximus inter civem Romanam peregrinumque matrimonio contracto eum qui nascitur, peregrinum

78. But as we have said when a marriage is contracted between a Roman woman and a peregrinus, the son who is born is a peregrinus . . (s)

(s) Goeschen, with whom Huschke agrees, proposes to read this section as follows:—"Quod autem diximus inter civem Romanam peregrinumque matrimonio contracto, eum qui nascitur peregrinum nasci, etiam si conubium inter patrem et matrem non sit, id lege Mensia (?) introductum est. Eadem lege illud quoque cavetur, ut si peregrinam, cum qua ei conubium non sit, uxorem duxerit civis Romanus, peregrinus ex eo coitu nascatur. Et in priore quidem specie necessaria lex Mensia fuit: nam alioquin conubio inter patrem et matrem non interveniente is qui natus est secundum juris gentium regulam matris, non patris condicioni accedit. Qua parte autem jubet lex, e cive Romano et peregrina peregrinum nasci, nihil novi introduxit: nam etiam sine ea lege e regula juris gentium idem futurum erat."

But as we have said, when a marriage has been contracted between a Roman woman and a peregrinus, the son that is born is a peregrinus, even although the conubium does not

exist between the father and mother. This was introduced by the *lex Mensia*. By this law it is also enacted, that if a Roman citizen has married a peregrina with whom there is no *connubium*, the son born from such intercourse is a peregrinus. With regard to the former case, the *lex Mensia* is operative; for otherwise, as the *connubium* does not exist, the child who is born follows, in accordance with the law of nations, the condition of the *mother*, not that of the *father*; but so far as the law enjoins that the son of a Roman citizen and a peregrina is a peregrinus, it has introduced nothing new, for even without that law the same result would have followed by the rule of the *jus gentium*. Ulp. Frag. v. 8. states the effect of the *lex Mensia* thus: "*lex Mensia ex alterutro peregrino natum deterioris parentis condicionem sequi jubet.*"

79. Adeo autem hoc ita est, ut . . . (t) sed etiam, qui Latini nominantur: sed ad alios Latinos pertinet, qui proprios populos propriasque civitates habebant et erant peregrinorum numero.

79. But this applies also to those whom we call Latini; likewise to the other Latini, who are formed into distinct nations and have their own civic rights and who were reckoned in the number of the peregrini.

(t) Goeschen thinks that possibly the lost lines are, "*ut non interveniente conubio matrem isquoque sequatur qui ex cive Romano et Latina coloniaria vel Juniana nascitur, quamquam hoc casu cessat lex Mensia, quæ sane non eos tantum spectat, qui peregrini,*" etc.

That where the *connubium* does not exist, the child born to a Roman citizen by a Latina coloniaria, or Juniana would follow the condition of his mother; although in this case nothing is effected by the *lex Mensia*, which certainly regards not only those who are peregrini but those who are called Latini, etc.

Huschke proposes to read, "*ut ex Latina et cive Romano qui nascitur, ex solo jure gentium matris condicioni accedat quamquam lege Mensia non solum ceteri peregrini comprehenduntur, sed etiam, qui Latini nominantur.*"

That the child born of a Latin woman and a Roman citizen would by the operation of the *jus gentium* alone

be of the same status as his mother; although in the *lex Mensia* not only are the other peregrini included, but also those who are called *Latini*.

The Romans sometimes allowed those whom they subdued to preserve their own laws, and treated such people as peregrini, properly so called; their children also being regarded as peregrini. For the civil consequences of marriage with *Latini* or *Latinæ*, see also sec. 66. and note on sec. 71.

80. *Eadem ratione ex contrario ex Latino et cive Romana qui nascitur, civis Romanus nascitur. Fuerunt tamen qui putaverunt ex lege Ælia Sentia contracto matrimonio Latinum nasci, quia videtur eo casu per legem Æliam Sentiam et Juniam connubium inter eos dari, et semper connubium efficit, ut qui nascitur patris conditioni accedat: aliter vero contracto matrimonio eum qui nascitur jure gentium matris condicionem sequi. At vero hodie civis Romanus est; scilicet hoc jure utimur ex senatusconsulto, quo auctore divo Hadriano significatur, ut omni modo ex Latino et cive Romana natus civis Romanus nascatur.*

80. For the same reason on the other hand, the child of a *Latinus* and a Roman woman is born a Roman citizen: yet some have thought, that the marriage having been contracted in accordance with the *lex Ælia Sentia*, that the child was born a *Latinus*, because it seemed that in this case the *connubium* is granted to them by means of the *lex Ælia Sentia* and *Junia*, and the *connubium* always has this effect, that the child takes the status of the father; but the child who is born in a marriage otherwise contracted follows, by the law of nations, the condition of the mother. But certainly at the present time such an one is a Roman citizen. We observe this law in accordance with a *senatus-consultum* made by the Emperor Hadrian, in which it is declared that in every case the child born of a *Latinus* and a Roman woman is born a Roman citizen. (*u*)

(*u*) This *senatus-consultum* would have the effect of restraining the operation of the *lex Mensia* as referred to in secs. 78, 79. Where the *connubium* had been granted, this *senatus-consultum* accorded the *civitas* to the son of a *Latinus* in opposition to the general principle, as stated "*qui nascitur patris conditioni accedat*;" in other cases its effect would be simply to restore the rule of the *jus gentium*. For

the full understanding of this section we must bear in mind that a Latinus after marriage with a Roman woman could on certain conditions (see sec. 29) claim the citizenship.

81. *His convenienter etiam illud senatusconsulto divo Hadriano auctore significatur, ut ex Latino et peregrina, item contra ex peregrino et Latina qui nascitur, matris conditionem sequatur.*

81. It is determined also agreeably to this by a *senatus-consultum*, on the authority of the Emperor Hadrian, that a child born to a Latinus and a peregrina, and on the other hand the son of a peregrinus and a Latin woman, follows the legal condition of the mother.

82. *Illud quoque his conveniens est, quod ex ancilla et libero jure gentium servus nascitur, et ex libera et servo liber nascitur.*

82. It is also agreeable to these enactments, that the child of a female slave and a free man is according to the *jus gentium*, born a slave, and the child of a free woman and a slave is born free.

83. *Animadvertere tamen debemus, ne juris gentium regulam vel lex aliqua vel quod legis vicem optinet, aliquo casu commutaverit.*

83. Yet we ought to observe (*v*) whether any law or anything that has the power of law has altered in any particular case the rule of the *jus gentium*.

(*c*) The *senatus-consultum* referred to in sec. 80, and the *lex Mensia* modified the principle of the *jus gentium*, that without the *connubium* the child takes the status of the mother. In the subsequent sections 84-86, special cases are mentioned in which the rule was restored after having been abrogated.

84. *Ecce enim ex senatusconsulto Claudiano (u) poterat civis Romana quæ alieno servo volente domino ejus coit, ipsa ex pactione libera permanere, sed servum procreare: nam quod inter eam et dominum istius servi convenerit, ex senatusconsulto ratum esse jubetur. Sed postea divus Hadrianus iniquitate rei et inelegantia juris motus restituit juris gentium regulam, ut cum ipsa mulier libera*

84. For, indeed, a Roman woman who has intercourse with the slave of another person, having obtained the consent of his master, would by virtue of the *senatus-consultum* of Claudius, on the ground of contract herself remain free, but bear a slave: for what had been agreed upon between the woman and the master of this slave was ratified by this *senatus-consultum*; but subsequently

permaneat, liberum pariat.

Hadrian, influenced by the want of equity in the thing, and the absurdity of the law, restored the rule of the *jus gentium*, that since the woman herself remains free, her child also is free.

(w) The child born of a slave woman was born a slave. That this should be so was regarded as being according to nature; it was the *regula juris gentium*. It was a principle of the *Jus civile*, that where the *connubium* existed between the father and the mother, the child born followed the condition of the father. Since there could be no *connubium* with a slave woman, a special enactment was needed by which it should be determined under what circumstances the child of a slave woman should be born free, or when the child of a free woman should be born a slave. The *Senatus Consultum Claudianum*, passed in the year A.D. 52, in the reign of the Emperor Claudius, prescribed, First—That when a free man had children by a woman whom he supposed to be free, but who turned out to be a slave, the female children should follow the condition of the mother, but the males should be free. Vespasian changed this law, and re-established the rule of the *Jus gentium*—that the children of a slave woman should be born slaves. Secondly—If a free woman lived with another's slave by the consent of the owner, it might be agreed, that her children should be born slaves while she herself retained her freedom. This departure from the *regula juris gentium* was also set aside by the Emperor Hadrian. Thirdly—The principal provision, however, of the *Senatus Consultum Claudianum* was the following:—When a free woman cohabited with the slave of another, knowing him to be such, and when she persevered in this cohabitation, notwithstanding a warning (*denuntiatio*) given three times by the slave's master, or by the tutor of the owner, or by some person empowered to act on his behalf, or if the slave were owned by a *municipium*, then, without such warning, the mother, although free, might, by the sentence of the

magistrate, be proclaimed to be the property of the owner of the slave; and the children to which she gave birth were born in a servile condition, even though the mother had not at the time of the birth been adjudicated a slave. It was held that the mother, knowing the man with whom she had cohabited to be a slave, and living with him without the consent of his owner, had vitiated her offspring. Justinian altered the law. "This was," says he, "in our opinion, unworthy of our age."—"Quod indignum nostris temporibus esse existimantes, etc." (Ins. l. I. t. xii. s. 1.)

Tacitus, in his *Annales*, has been supposed to give the words of this *senatus-consultum*. Speaking of its provisions he says, "*Inter quæ refertur ad patres de pœna feminarum, quæ servis conjungerentur: statuitque, ut ignaro domino ad id prolapsæ in servitute: sin consensisset, pro libertis haberentur.*" (Tac. *Annal.* lib. xii. 53.) It has been objected that Tacitus gives the text of the *senatus-consultum* very imperfectly. No doubt this is quite true, but it should be remembered that both the Roman historians and jurists as the rule give only the substance or the outline of both the enactments and forms which they record. Mr. Long suggests for the reading "*libertis*" the word "*liberis*," but as he admits "a woman in some cases was reduced to the condition of a *liberta* by the *senatus-consultum*," there is no doubt the above is the true reading, for as Ernesti says, "*Sed recte, pro liberta: non enim liberta vere.*"

Ulpian, with his accustomed terseness and clearness, states the fundamental law on this subject: "*Ex cive Romano et Latina Latinus nascitur, et ex libero et ancilla servus; quoniam cum his casibus connubia non sint,*"—and then he adds the rule without which a system of slavery must cease to exist—"partus sequitur matrem. In his qui jure contracto matrimonio nascuntur, conceptionis tempore disceptatur: in his autem qui non legitime concipiuntur, editionis; veluti si ancilla conceperit, deinde manumissa pariat, liberum parit; nam quoniam non legitime concepit, cum editionis tempora libera sit, partus quoque liber est." (Ulp. *Frag.* tit. v. ss. 9, 10.)

In speaking of the different kinds of *capitis deminutio*, Ulpianus refers to this *senatus-consultum* in the following terms: “*Maxima capitis deminutio est, per quam et civitas et libertas amittitur, veluti cum incensus aliquis venierit, aut quod mulier alieno servo se junxerit, denuntiante domino, et ancilla facta fuerit ex S.C. Claudiano.*” (Ulp. tit. xi. ss. 10, 11.) Theophilus, in his paraphrase on the Institutes of Justinian, refers to this *senatus-consultum* and shows how a woman may be reduced to slavery. He says, “For if a free woman becomes enamoured with my slave, and as a consequence his service to me is hindered, it is permitted me to send a notice with seven witnesses to separate herself from him; if she fail to do so, I can then send a second notice; if she still continue to live with him, I warn her for the third time. If she then fails to put an end to the connexion, I give public notice before a magistrate and obtain a judgment, which has the effect of making her my slave, so that I not only become her master, but take possession of her entire property.” This was the law, he says, that Justinian abrogated. (Theophilus Par. lib. III. tit. xii. s. 1.)

Gans. Schol. p. 90. Puchta Instit. vol. ii. pp. 429, 430. Walther Geschichte des R. R. p. 65. See also the note in Ernesti's Tac. Opera. lib. xii. c. 53., and the valuable article by Geo. Long, in Dict. Gr. & Rom. Antiq. under the head *senatus-consultum*.

85. *Ex lege . . . ex ancilla et libero poterant liberi nasci: nam ea lege (x) cavetur, ut si quis cum aliena ancilla quam credebatur liberam esse coierit; si quidem masculi nascantur, liberi sint, si vero feminae, ad eam pertineant cujus mater ancilla fuerit. Sed et in hac specie divus Vespasianus inelegantia juris motus restituit juris gentium regulam, ut omni modo, etiam si masculi nascantur, servi sint ejus cujus et mater fuerit.*

85. By virtue of the law children would be born free if the father were free and the mother a slave; for by that law it is provided, that if any one has had intercourse with another man's slave, supposing her to be a free woman, children born of the male sex shall be free, but those of the female sex shall belong to the owner of the mother. But also in this case Vespasian, moved by the absurdity of the law, has restored the rule of the *jus gentium*, so that without distinction the child-

ren of a slave woman, even those born of the male sex, shall be the slaves of the owner of the mother.

(x) *Ea lege.* Some writers refer these words to the *senatus-consultum Claudianum*, and consequently the words “*eiusdem legis*” in the next section to the same enactment. Mr. Long, following Huschkius, is of opinion that the word “*lex*” in neither case refers to the *senatus-consultum*, but to the *Lex Ælia Sentia*. Hollweg thinks the *lex* was entirely different from the *senatus-consultum*, and, without giving his authority for his opinion, states the difference as follows:—“*De senatus-consulto Claudiano hæc lex, quam antiquiorem esse puto, eo differt quod nulla domini denunciatione aut pactione facta libera mulier servos pariat.*” There seems some reason for this opinion, as the Romans did not usually employ the words *lex* and *senatus-consultum* interchangeably. Hollweg *de caus. prob.* p. 21. Gans Schol. pp. 91. 92. See however the notes on the next section.

86. *Sed illa pars ejusdem legis (y)* salva est, ut ex libera et servo alieno, quem sciebat servum esse, servi nascantur. Itaque apud quos talis *lex* non est, qui nascitur jure gentium matris condicionem sequitur et ob id liber est.

86. But that rule of the same law was preserved, by which the children of a free woman and another person's slave, whom she knew to be a slave, are born slaves. Hence, a child born where such a law does not exist follows according to the *jus gentium* the legal status of the mother, and is therefore free.

(y) *Sed illa pars ejusdem legis salva est.* There has been much discussion as to whether the *lex* in this and the preceding section refers to the *S.C. Claudianum*, or to some *lex* in the strict signification of the term. Some authorities well worthy of consideration, especially Huschkius, one of the most acute of the German Jurists, is of opinion that the *lex* referred to is some enactment different from the *S. Consultum* under discussion. “Huschkius,” says Goeschen, “cum aliis viris doctis de lege Ælia Sentia cogitat.” Domenget says

“La loi dont parle ici Gaius est sans doute le S.C. Claudien.” And there can be no impropriety in applying the term *lex* to a senatus-consultum which to use the expression of Gaius “*legis vicem optinet.*” (Lib. i. sec. 4.)

But there is another reason which may be adduced in support of the opinion that the *lex* and the senatus-consultum here referred to are one and the same enactment. The *lex*, it will be remembered, was originally passed by the *populus*, that is by the *universi cives*, including both the plebs and patricians; but by an extension of the term, which was indeed a departure from its exact meaning, the word *lex* became applied to the plebiscitum, and we find the expression “*lex plebeivescitum,*” and very soon afterwards simply the term *lex*. Further, the session of the Senate came to be called the comitia, a term properly applied to the public assembly of the Roman people. Also where a *lex* was really passed by the people, it was not seldom that it was ignored, and the senatus-consultum only referred to; the *lex* by which it was confirmed or declared being treated as a mere formality. The senatus-consultum, as the aristocratic and imperial power advanced, constantly trenched upon the liberties of the plebs. Even in the reign of Augustus the senatus-consultum was deferred to at times as though it were a *lex*, and under his successors this became more frequent until at last the rogation of the people was dispensed with altogether. In this way the senatus-consultum came to usurp the place of the *lex*, and was spoken of as such. There were however instances in which the term *lex* continued to be strictly applied. (See Gai. ii. 275, 276.) When this change took place it became customary to apply to the senatus-consultum the name of the person who brought it forward, as in ancient times had been the practice with the *leges*. Such was the case, for example, in a senatus-consultum passed in the reign of Augustus, the S.C. Silanianum, the S.C. Tertullianum, Orphitianum, Trebellianum, and many others named after the magistrates presiding in the senate. The senatus-consulta Neronianum, and Claudianum, which derived their names

from the emperors who made the motion for their introduction, will be familiar to the student.

The argument in favour of the *lex* being different from the senatus-consultum is well stated by Mr. Long. He says: "The exception in the senatus-consultum of Claudius applied to the case of a compact between a free woman and the master of the slave, which compact implies that the woman must know the condition of the slave, and therefore according to the terms of the *lex* the issue would be slaves. But Gaius says (i. 84) that under this senatus-consultum the woman might by agreement continue free and not give birth to a slave; for the senatus-consultum gave validity to the compact between the woman and the master of the slave. At first sight it appears as if the senatus-consultum produced exactly the same effect as the *lex* with respect to the condition of the child. But this is explained by referring to the chief provision of the senatus-consultum, which was that cohabitation with a slave "*invito et denuntiante domino*" reduced the woman to a servile condition, and it was a legal consequence of this change of condition that the issue of her cohabitation must be a slave. The *Lex Ælia Sentia* had already declared the condition of children born of the union of a free woman and a slave to be servile. *The senatus-consultum added to the penalty of the lex by making the mother a slave also, unless she cohabited with the consent of the master*, and thus resulted that "*inelegantia juris*" by which a free mother could escape the penalty of the senatus-consultum through her agreement, and yet her child must be a slave pursuant to the *lex*. Hadrian removed this inelegantia by declaring that if the mother, notwithstanding the cohabitation, escaped from the penalties of the senatus-consultum by virtue of her compact the child also should have the benefit of the agreement. The senatus-consultum only reduced the cohabiting woman to a servile state when she cohabited with a man's slave, "*invito et denuntiante domino*;" if she cohabited with him knowing him to be a slave, without the knowledge of the master, there could be no denuntiatio, and this case

it appears, was not affected by the *senatus-consultum*, for Gaius observes as above stated (i. 86) that the *Lex* had still effect and the offspring of such cohabitation was a slave. The fact of this clause of the *lex* remaining in force after the enacting of the *senatus-consultum*, appears to be an instance of the strict interpretation which the Roman jurists applied to positive enactments; for the *senatus-consultum* of Hadrian, as stated by Gaius, only applied to the case of a contract between the master of the slave and the woman, and therefore its terms did not comprehend a case of cohabitation when there was no compact. Besides this, if a free woman cohabited with a man's slave, either without the knowledge of the master or with his knowledge, but without the "*denuntiatio*," it seems that this was considered as if the woman simply indulged in promiscuous intercourse (*vulgo concepit*) and the mother being free the child was also free by the *jus gentium*; till the *lex* attempted to restrain such intercourse by working on the parental affections of the mother and the *senatus-consultum* by a direct penalty on herself. There was a "*juris inelegantia*" in a free woman giving birth to a slave, but this was not regarded by Hadrian, who was struck by the inelegantia of a woman by compact being able to evade the penalty of the *senatus-consultum* while her child was still subject to the penalty of the *lex*.

In section 84 the case is that of a free woman having obtained the consent of the master of the slave; in this section the woman acts with full knowledge that the man is a slave and without having obtained the master's consent. This appears to be the distinction between the two cases. Domenget (p. 52) suggests that to bring this paragraph into accord with sect. 84, we must suppose that Gaius here refers to a Roman woman or a Latina, and in the former passage to a peregrina. The use of the words "*civis Romana*" in sect. 84, and "*libera*" in the present section appears clearly to exclude such a hypothesis. According to Paulus, (sent. ii. 21.) the child of a Roman or Latin woman, although begotten by a slave, was born free. It was otherwise if the

mother were a peregrina. This anomaly was done away with in the time of Justinian, and if the mother of the child were free at any moment between the time of conception and that of birth she bore a free child (*Instit. de ingen. proœm.*)

Gans Schol. p. 92. et seq. Puchta's *Cursus der Instit.* pp. 320, 321, and note d. *Instit. R.L.* p. 46. *Diet. Gr. Rom. Antiq.* pp. 857, 858. *Lex* 2. s. 9. de orig. jur. (i. 2.)

87. Quibus autem casibus matris et non patris condicionem sequitur qui nascitur, iisdem casibus in potestate eum patris, etiamsi is civis Romanus sit, non esse plus quam manifestum est. Et ideo superius rettulimus, quibusdam casibus per errorem non justo contracto matrimonio senatum intervenire et emendare vitium matrimonii, eoque modo plerumque efficere, ut in potestatem patris filius redigatur. (z)

87. But it is very clearly manifest that in those instances in which the child follows the legal condition of the mother, and not that of the father, the child is not under the *potestas* of his father, even if the father be a Roman citizen. Hence, we have said above, that in certain cases, if through error, a marriage has been illegally contracted, the senate steps in and repairs the faulty marriage, and in that manner generally causes the son to be brought under the *potestas* of his father.

(z) See Gai. I, sec. 67.

88. Sed si ancilla ex cive Romano conceperit, deinde manumissa civis Romana facta sit, et tunc pariat, licet civis Romanus sit qui nascitur, sicut pater ejus, non tamen in potestatem patris est, quia neque ex justo coitu conceptus est, neque ex ullo senatus-consulto talis coitus quasi justus constituitur.

88. But if a female slave having conceived by a Roman citizen, has thereupon been made free by manumission and afterwards gives birth to a child, although her child is a Roman citizen as well as his father, yet is he not under the *potestas* of his father because he is not conceived in a lawful connection, nor is such connection, according to any senatus-consultum, treated as lawful.

89. Quod autem placuit, si ancilla ex cive Romano conceperit, deinde manumissa pepererit, qui nascitur liberum nasci, naturali ratione fit. Nam hi qui illegitime concipiuntur,

89. But the proposition, that the child of a female slave, begotten by a Roman citizen, and born after the manumission of the mother, is born free, rests upon a principle of

statum sumunt ex eo tempore quo nascuntur: itaque si ex libera nascuntur, liberi fiunt, nec interest ex quo mater eos conceperit, cum ancilla fuerit. At hi qui legitime concipiuntur, ex conceptionis tempore statum sumunt.

natural reason; for those who are illegitimately conceived, take their legal status from the moment of their birth, and so are free, if they are born of a free woman; nor does it matter by whom the mother conceived them, when she was yet a slave. But those who are legitimately conceived take their status from the time of conception.

90. Itaque si cui mulieri civi Romanæ prægnanti aqua et igni interdictum fuerit, eoque modo peregrina fiat, et tunc pariat, complures distinguunt et putant, si quidem ex justis nuptiis conceperit, civem Romanum ex ea nasci, si vero volgo conceperit, peregrinum ex ea nasci.

90. Therefore many make a distinction, and are of opinion that if a sentence of banishment (*aquæ et ignis interdictio*) be pronounced against a pregnant Roman woman, and she become in this manner an alien peregrina, and afterwards bring forth a child, the child born of her is a Roman citizen if conceived in lawful marriage, but if conceived by prostitution the child shall be an alien.

91. Item si qua mulier civis Romana prægnans ex senatusconsulto Claudiano ancilla facta sit ob id, quod alieno servo coierit denuntiante domino ejus, complures distinguunt et existimant, si quidem ex justis nuptiis conceperit, civem Romanum ex ea nasci, si vero volgo conceperit, servum nasci ejus cujus mater facta est ancilla. (a)

91. Again, when during her pregnancy a Roman woman becomes a slave according to the senatusconsultum of Claudius, because she has had intercourse with a slave, notwithstanding the warning of his master, many make a distinction, and think, that if she have conceived in a legal marriage, the child when born is a Roman citizen, but on the other hand if she have conceived as a common prostitute the child is born a slave of that master, whose slave the mother has also become.

(a) Justinian declared Ll. 5, 18, de stat. hom. (i. 5.) that the freedom of the mother at any time between conception and birth should secure the freedom of her child "quia non debet calamitas matris nocere ei qui in ventre est."

92. *Item peregrina quoque si volgo conceperit, deinde civis Romana facta sit, et pariat, civem Romanum parit; si vero ex peregrino, cui secundum leges moresque peregrinorum conjuncta est, videtur ex senatusconsulto quod auctore divo Hadriano factum est peregrinus nasci, nisi patricjus, civitas Romana quæsitæ sit.*

92. Again, if a peregrina has conceived by prostitution, and subsequently, having become a Roman citizen, gives birth to a child, her son is born a Roman citizen, but if she has conceived by a peregrinus with whom she has been united according to the laws and customs of the peregrini, it appears from a *senatus consultum* made by the authority of Hadrian that the child will be born a peregrinus, unless the Roman *civitas* has been acquired by his father.

93. *Si peregrinus (b) cum liberis civitate Romana donatus fuerit, non aliter filii in potestate ejus fiunt quam si Imperator eos in potestatem redegerit. Quod ita demum is facit, si causa cognita aestimaverit hoc filiis expedire: diligentius atque exactius enim causam cognoscit de impuberibus absentibusque. Et hæc ita edicto divi Hadriani significantur.*

93. If a peregrinus has had granted to him the Roman *civitas* for himself and his children, the latter will not be under the *potestas* of their father, unless the emperor has brought them under it; and this he only does when, after an examination of the grounds, he judges it to be for the advantage of the children; but he enquires with especial care and diligence as to the affairs of minors and absentees. And this is determined by an edict of the Emperor Hadrian.

(b) *Cum liberis civitate, etc.* After *Si peregrinus* there is a lacuna in the MS. till we come to the words "non aliter." Klenze proposes to read "cum liberis jam natis." Lachmann, "cum filiis suis." The text follows the reading of Huschkius. In the MS. the reading is according to the last named critic manifestly "liberis." Nor can it be objected, he says, that in the following period the reading is "filiis"—"hoc filiis expedire." We meet with a similar change of the expression *liberi* and *fili* in different periods in sec. 55. bk. I. "Item in potestate nostra sunt *liberi* nostri," and then in the next period, "fere enim nulli alii sunt homines qui talem in *fili*os suos, &c." (Huschk. p. 2.)

94. Item si quis cum uxore pregnantē civitate Romana donatus sit, quamvis is qui nascitur, ut supra diximus, *civis Romanus* sit, tamen in potestate patris non fit: idque subscriptione divi Hadriani significatur. Quae de causa qui intellegit uxorem suam esse pregnantem, dum civitatem sibi et uxori ab Imperatore petit, simul ab eodem petere debet, ut eum qui natus erit in potestate sua habeat.

94. Again, if a man and his wife, she being pregnant at the time, have been presented with the Roman *civitas*, although the child when it is born is a Roman citizen, as we have said above, yet it is not under the *potestas* of its father, as is declared by a rescript of the Emperor Hadrian; therefore a man who knows that his wife is pregnant, when he seeks the *civitas* from the emperor for himself and his wife, ought at the same time to petition that his issue which may be born should be placed under his *potestas*.

95. Alia causa est eorum qui Latini sunt (c) et cum liberis suis ad civitatem Romanam perveniunt: nam horum in potestate fiunt liberi. Quod ius quibusdam peregrinis

95. It is different with those who are Latini, and who have themselves with their children attained to the Roman *civitas*; for their children are under the *potestas* of their father. This right has also been given to certain peregrini

(c) *Alia causa est eorum, qui Latini sunt, etc.*

In the two preceding paragraphs Gaius says that when a peregrinus and his *enciente* wife are presented with the Roman *civitas*, the children will not come under the *patria potestas*, except the emperor shall declare that such shall be the case. The present paragraph stands in opposition to this. The reading “Latini sunt, etc” is by no means certain. The letters, as far as they are legible, may mean equally well *Latii jure*; and Huschkius affirms that this is the correct reading. He regards the reading “eorum, qui Latini sunt” as unendurable, and says it should be *qui Latinorum*. What then are we to understand by “*Latii jure—ad civitatem Romanam pervenire?*” It has been usually understood to mean, that those Latini who attained to offices of honour acquired by virtue of their position the Roman *civitas*. The existence of such right is confirmed by Ascon. in Pison. p. 3. “Pompeius enim non in novis colonis eas constituit,

sed veteribus incolis manentibus jus dedit Latii, ut possent habere jus, quod ceteræ Latinae coloniae, id est, ut gerendo magistratus civitatem Romanam adipiscerentur." See also Cic. ad Attic. 5. 11. Savigny verm. Schr. Bd. 3. s. 294. Appian. 2. 26. It would seem that Gaius did not understand this operation of the *jus Latii*, for in the following paragraph he speaks of it for the first time, and says that it was *minus latum*, more limited. It is also to be observed that he does not speak here of that which is referred to by many writers—*Latii jure ad civ. Rom. pervenire*—merely, but of the *Latii jure cum liberis ad civ. Rom. pervenire*.

According to Gaius there were, *Latii jure*, two degrees in the acquisition of the Roman *civitas*: 1. A more extended, by which a man and his children attained to the *civitas*. 2. A limited one, in which a person who had held a position of dignity and honour, himself *alone* attained to the citizenship. The more extended *civitas* was attained by the *Lex Servilia* or more correctly the *Lex Ælia*, which was probably incorporated without alteration into the *Lex Servilia*. C. T. Zumpt de leg. et jud. republ. p. 20. seq. The chapter "*de civitate danda*" enacts that he who has carried a prosecution through to conviction, or "*aliqua ex re*," shall himself, his wife, children and grandchildren, receive as a reward the *civitas*. The expression is "*cives Romanei justei*." Since in public law there is no *justa* nor *injusta civitas*, it must mean that the children and grandchildren should have the same legal status as the *justi liberi* of a Roman family, and be also in like manner under the *potestas*. Compare Cic. Orat. pro Bal. c. 23. 24. Liv. 41. 8.

In the old Latin treaty between Rome and Latium, the *jus municipium* was established and defined. It was probably only the renewal of a more ancient treaty and at the time of its renewal was extended to the *Hernicii*. Dion. 7. 53. 8. 69. 70. 77. When Latium was overthrown, the Romans did not utterly destroy the right of the *municipium* so far as the *Latini* were entitled to it, but it was regulated by the *lex* to which Livy refers. It has been conjectured that there was

a provision in these *leges datæ*, which empowered the Roman senate to determine the rights of the Latin cities, and that the so-called *jus Latii* had its origin in these laws.

For the discussion of this question the fragments of the *leges Flaviæ* are of very great importance. These were given by the Roman authorities to the Latin colonies at Salpensa and Malaga in Spain, and first made known to Germany by Mommsen. The bronze tables, weighing together 264 Castilian pounds, were found on the property of D. Jorge Loring, in Malaga, and were first published under the title "*Estudios sobre los dos bronceos encontrados en Malaga a fines de Octubre de 1851. Por el doctor Don Manuel Rodriguez de Berlanga, &c., 1853.*" The edition by Mommsen contains an admirable explanation. The tables give us the law of the Latin colonies in Salpensa and Malaga in the province of Bætica, in Spain. The *Æs Salpensanum* contains chapters 21 to 29, the *Æs Malacitanum*, chapters 51 to 69. Vespasian had made the citizens of these two towns *Latini*, and Domitian is supposed to have conceded these laws. The tables are valuable, as they are thought to contain the substance, or at least the plan, of the laws and privileges granted to all the Latin colonies. They do not materially differ from the explanations already given. The acquisition of the *civitas*, by virtue of serving in the magistracy accorded to the citizens of Salpensa, (Rubr. 21. 25) was conceded to the ordinary annual magistrates, the *Duumviri* or imperial prefects, the *Ædiles* and the *Quæstors*. Not only these persons, but also their parents, wives, children and grandchildren born in a lawful Latin marriage, attained to the *civitas*. All who attained to the *civitas* by virtue of this law, or by the edict of Vespasian, Titus or Domitian, continued under the *potestas*, the *manus* or *mancipium* of those who had thus become Roman citizens. In accordance with Roman law they had the *jus tutorem optandi*—all their former rights over their own or their parents freed-men. R. 22, 23. See Huschke *Kritik*. pp. 3 to 24, where the whole question is admirably treated. Puchta *Inst.* I. 62. i. 108. a.

96. Magistratum gerunt, civitatem Romanam consequuntur; minus latum est, cum hi tantum qui vel magistratum vel honorem gerunt ad civitatem Romanam perveniunt. Idque conpluribus epistulis Principum significatur.

96. *The Latini* who discharge magisterial duties attain also to the Roman *civitas*, but this right is less extended when it is attained by those who exercise the duties of the magistracy or of some public office; and this is determined by many imperial *epistulae*.

97. *Non solum tamen naturales liberi secundum ea quæ diximus, in potestate nostra sunt, verum et hi quos adoptamus.*

97. Not only are our natural children in our power, as we have said, but those also whom we adopt.

98. Adoptio (*d*) autem duobus modis fit, aut populi auctoritate, aut imperio magistratus, velut Prætoris.

98. Adoption takes place in two modes; either by the authority of the people, or by the administrative power (imperium) of a magistrate, for example, of the prætor.

(*d*) Adoptio with the Romans was that act on the part of the citizen by which a person was brought into the family and placed under the *patria potestas* of its head. "Adoptionis nomen est quidem generale; in duas autem species dividitur, quarum altera adoptio similiter dicitur, altera arrogatio. Adoptantur filii familias; arrogantur, qui sui juris sunt." Modestinus in l. 1. sec. 1. Dig. de adopt. et. eman. (1. 7.) There are thus two elements in adoptio. It was a legal solemnity celebrated by a Roman citizen; and then it introduced the party adopted into the *familia* and placed him as already observed under the *patria potestas*. Adoptio was not as extensive in its operation as the legitimatio per subsequens matrimonium. The legitimated children entered into relationship by virtue of the legitimatio with all the *blood* relations of the father. Not so the adopted child. He became related only to

the agnates of the family. An adopted daughter for example became agnate to a man's son, but if she were emancipated, the relationship ceased, and the son could marry her. *Adoptio* could never give rise to the relationship of brother or sister, or nephew to the *pater adoptans*. As a legal institute adoption resembled nature, hence the maxim, "*Adoptio naturam imitatur.*" This principle gave rise to important results. There must for example be no disparity of age. The *pater adoptans* must be at least eighteen years older than the child adopted. He must be a *civis Romanus*. He must not have suffered castration, though he might have been a *spado*. There could not be an "*adoptio ad diem*," *i. e.* one to take place on a future day. The *pater adoptans* must not have children of his own, unless it could be proved that his own children would suffer no injury by the adoption. Then for all kinds of adoption there must be the *pubertas plena*.

There were three kinds of *adoptio* in Roman law: 1. *Arrogatio*. 2. *Datio in adoptionem*. 3. Adoption on the part of a woman.

I. *Arrogatio*. In *arrogatio* a *homo sui juris*, that is, a man in his own power, was brought under the *potestas* of another. It was the adoption of a *pater-familias* and involved a *capitis deminutio* to the man arrogated, reducing him to the condition of a *filius-familias*. It could only take place by virtue of the highest power of the State, and required a *lex per populum* in the *comitia centuriata*. In later times, under the emperors it could be effected only by an imperial rescript. After *causæ cognitio* the emperor decided whether the *arrogatio* was to be permitted or not. The civilians say that *arrogatio* must be either *per populum* or *per principem*. The *causæ cognitio* was appointed that no interests might be violated. It was usually an old man who had no children of his own that applied to the *populus* or to the *princeps* for the permission to adopt a *filius* by *arrogatio*. The usual consequences of *datio in adoptionem* followed in the case of *arrogatio*, but there was one special result that should be

noted. Not only was the arrogatus brought under the potestas of the arrogator, but he drew his children with him into his new family, who also fell under the same *potestas*.

The form of words used in arrogatio has been preserved by Aulus Gellius in his *Noctes Attici* and is as follows:—

Gell. v. 19. Arrogatio autem dicta, quia genus hoc in alienam familiam transitus per populi rogationem fit. Ejus rogationis verba hæc sunt: “Velitis, jubeatis, Quirites uti L. Valerius L. Tito tam jure legeque filius siet, quam si ex eo patre matreque familias ejus natus esset, utique ei vitæ necisque in eo potestas siet, uti patri endo filio est. Hæc ita, uti dixi, ita vos Quirites, rogo.”

The pater arrogator succeeded in universal jus to the property of the arrogatus during the period of what has been termed classical law. In the time of Justinian, when the distinction between a homo sui juris and a homo alieni juris was done away with, the property of the arrogatus remained his own. He had, however, only a nude ownership; the pater arrogator had the usufruct. The creditors had a lien upon it for their debts, which the arrogator was obliged to meet, or they were entitled to the “missio in bona arrogati.”

In the older law, women and children under fourteen years of age could not be adopted by arrogation, nor could a man who was placed under the tutela. In later law women might be adopted as well as men, that is, if they were sui juris. By the *Epistola Divi Pii* an impubes might be adopted by arrogation, but there must first be causæ cognitio at which it must be ascertained whether the arrogator was a fit person to bring up and educate the impubes, and there must also be the consent of all the tutores to the arrogatio. The arrogator must give *cautio*, or security, 1. That if the impubes should die, he will give up his entire property to his relatives. 2. That in the case of the mancipation, or death of the impubes, the property should be restored either to himself or his heir, and that in case of the death of the arrogator, the impubes should have a claim upon the fourth part of the

inheritance of the arrogator :—the *quarta omnium bonorum*, or as it was called the *quarta Divi Pii*.

II. The *Datio in adoptionem*. This is *adoptio* in the strict sense of the term ; it was the ceremony by which a *filius familias* who was in the power of his parent—in *potestate parentum*—whether child or grandchild, male or female, was transferred to the power of the person adopting him. It was effected under the authority of a magistrate, the *prætor* for instance at Rome, or a governor (*præses*) in a province. The person to be adopted was first *mancipated* before the competent authority, and then surrendered to the *pater adoptans* by the legal form called “*in jure cessio*.”

It is usual to say that—“*Adoptio per prætorem fit, non per populum aut per principem*.” There was no *causæ cognitio* ; for while the father lived the state did not deem it necessary to interfere. The three parties appeared in the court of the *prætor*, and the protocol was completed, shewing that an adoption was intended. Before the time of Justinian the form was complicated, but still the *prætor* was not required to interpose his authority. First the *filius* was sold, then he was *mancipated*, then *remancipated*, and finally the agnatic band was severed and he was yielded in *jure cessio* to his new *familia*. “*Si pater*,” says the law of XII Tables, “*filium ter venumduit, filius a patre liber esto*.” Justinian provided that the *filius* should not lose by his adoption into the *familia* of another. The power of his own father was not dissolved, nor was the adopted son brought under the *potestas* of his adopted father. The effect of *adoptio* in the time of Justinian was that the *filius* obtained a right of inheritance in the estate of his *pater adoptans*. He had thus two fathers. But he had merely a right to the estate of his father by adoption in the case of intestacy, and might be excluded from all benefit by will. He was not numbered among the *heredes necessarii*

When the *pater adoptans* happened to be an ascendant and not an actual extraneous, then the *datio in adoptionem*

had the effect of the ancient law. The filius entered into the new family and fell under the potestas of his pater adoptans. The phrase *plena adoptio* was applied to a child when he entered into the family of an ascendant, and when he was brought under an entirely new potestas. But when the filius was introduced into the family of an extraneus or stranger, then it was called an *adoptio minus plena*, in which case there was no change of the familia, nor of the potestas, but simply a right of inheritance. From the above remarks it will be seen that every arrogatio is plena, whilst adoptio may be *plena* or *minus plena*.

III. The third kind of adoption is that on the part of a woman. Such an adoptio seems to be a contradiction of the fundamental notion of adoption. A woman, we know, could exercise no patria potestas; nor are her children in the familia of the mother. "Fœmina semper finis familiæ." It was, however, ordained by an imperial rescript, that when a mother had lost her child by death, she might under the sanction of the state, in order to console her under her loss, adopt another in its place. When a child was thus adopted, it took the place of the lost one; and the mutual relationship of mother and child was identical with that which had subsisted between her and her own child. There was of course in this case no patria potestas, and no agnatic relatives were gained by the transaction. But what is to be noted is, that there was a *mutual right of inheritance*. When the mother made her will, she was bound to remember her adopted child, and when the child made a will, that child must not forget the mother. In the adoptio *minus plena* there was simply a unilateral right of inheritance, but in the case of adoptio on the part of the woman there was a bilateral right of inheritance. As an institution, it came between the adoptio plena and the adoptio minus plena.

There was a special consequence resulting from what was termed the adoptio ex tribus maribus ex S.C. Sabiano. If a father gave one of three sons in adoption, the father was bound to leave him a third part of his property.

99. *Populi auctoritate adoptamus eos qui sui juris sunt: quæ species adoptionis dicitur adrogatio, quia et is qui adoptat rogatur, id est interrogatur an velit eum quem adoptaturus sit justum sibi filium esse; et is qui adoptatur rogatur an id fieri patiatur; et populus rogatur an id fieri jubeat. Imperio magistratus adoptamus eos qui in potestate parentum sunt, sive primum gradum liberorum obtineant, qualis est filius et filia, sive inferiorem qualis est nepos, neptis, pronepos, proneptis.*

99. By the authority of the people we adopt those persons who are *sui juris*, and this form of adoption is called *arrogation*, because the party adopting is asked, *i.e.*, formally questioned, whether he wishes the person he is about to adopt to be legally his son; he who is adopted is asked whether he consents to be so; and the people are asked whether they ordain that this shall be done. By the authority (*imperium*) of the magistrate we adopt persons under the *potestas* of their relatives, whether they are in the first degree, as sons and daughters, or in an inferior degree, as grand-son, or grand-daughter, or great-grand-son or great-grand-daughter.

JUST. I. 11. 1.

100. Et quidem illa adoptio quæ per populum fit nusquam nisi Romæ fit, at hæc etiam in provinciis apud Præsides earum fieri solet.

100. That adoption which is made by the people takes place only in Rome; but that which takes place by the administrative power of the magistrate (*imperio magistratus*), usually takes place in the provinces, before their Presidents.

101. Item per populum feminæ non adoptantur; nam id magis placuit. Aput Prætorem vero vel in provinciis aput Proconsulem Legatumve etiam feminæ solent adoptari.

101. Moreover, women are not adopted by the authority of the people, for this is the better opinion; but they are usually adopted before the prætor, or in the provinces before the pro-consul or his lieutenant (deputy).

102. Item inpuerem aput populum adoptari aliquando prohibitum est, aliquando permissum est. Nunc ex epistula optimi Imperatoris Antonini quam scripsit Pontificibus, si justa causa adoptionis esse videbitur, cum quibusdam condicionibus permissum est. Aput Prætorem vero, et in pro-

102. Again, sometimes the adoption of a minor before the people was prohibited, sometimes permitted; now, by an *epistula* of the excellent Emperor Antoninus addressed to the *pontifices*, if there shall seem to be a legal ground for adoption, under certain conditions it is permitted. But

vinciis aput Proconsulem Legatumve,
cujuscumque ætatis adoptare pos-
sumus.

we may adopt a person of any age
before the prætor, and in the pro-
vinces before the pro-consul or lieu-
tenant.

JUST. i. 11. 3.

103. *Illud* vero utriusque adoptionis
commune est, quia et hi qui generare
non possunt, quales sunt spadones,
adoptare possunt.

103. This applies to both kinds of
adoption, that those who are impotent,
such as eunuchs, can adopt [and take
in arrogation].

JUST. i. 11. 9.

104. *Feminæ* vero nullo modo adop-
tare possunt, quia ne quidem natu-
rales liberos in potestate habent. (e)

104. On the other hand, women
can by no means adopt because they
have not even their own natural
children under their *potestas*.

JUST. i. 11. 10.

(e) We have observed that a kind of adoption on the part of a woman was admissible. The leading passage for this opinion is the following:—"Mulierem quidem, quæ nec suos filios habet in potestate, arrogare non posse certum est. Verum quoniam in solatium amissorum tuorum filiorum privignum tuum cupis vicem legitimæ sobolis obtinere: annuimus votis tuis secundum ea quæ annotavimus et eum perinde atque ex te progenitum ad fidem naturalis legitimi-que filii habere permittimus." *Dioclet. et Maxim. l. 5. Cod. de adopt. (8. 47.)*

105. Item si quis per populum sive
apud Prætores vel aput Præsides
provinciæ adoptaverit, potest eundem
alii in adoptionem dare.

105. Again, if any one has adopted
either before the *populus*, or the præ-
tor, or the president of a province,
we may again give the same to
another person in adoption.

106. Set illa quæstio est, an minor
natu majorem natu adoptare possit:
idque utriusque adoptionis commune
est. (f)

106. But the question has been
raised, whether a person can adopt
one older than himself; and this is
applicable to both kinds of adoption.

JUST. i. 11. 4.

(f) *Set illa quæstio, etc.* *Huschkius* says that this reading does not agree with the connexion nor with the style of *Gaius*, and that the passage is certainly corrupt. He con-

jectures that the original reading was "Set et illud q (quod) quæsitum est, an, etc."

He thinks the change was brought about in this way; quæsitu was changed into quæstio. Then the first q was dropped, and illud changed into illa. If we admit this reading, it would indicate that in the time of Gaius it was a moot point whether a person could adopt one older than himself.

107. Illud proprium est ejus adoptionis quæ per populum fit, quod is qui liberos in potestate habet, si se adrogandum dederit, non solum ipse potestati adrogatoris subiicitur, set etiam liberi ejus in ejusdem fiunt potestate tanquam nepotes.

107. This is a peculiarity of adoption which takes place before the *populus*, that he who has children under his *potestas*, if he give himself in arrogation, is not only himself subjected to the *potestas* of the adrogator, but also his children fall under the same *potestas* as grandchildren.

JUR. I. 11. 11.

108. Nunc de his personis videamus quæ in manu nostra sunt. Quod et ipsum jus proprium civium Romanorum est. (g)

108. Now let us speak of those persons who are in our *manus*, which is a legal power peculiar to Roman citizens.

(g) *Manus* was originally a species of *potestas* exerted by the man over the person of the woman. At first the husband exercised the *manus* over his wife only. At a later period it became customary to use it as a means of transfer without marriage. The original institution, however, of the *manus* was that of the husband; the woman was brought under his authority, and was said to be in *filia loco*. It was an institution analogous to the *potestas*, but accompanied by many points of difference, on account of its close connection and dependence upon the marital relation. It was not every husband that could exercise the *manus* over his wife, but only those who had been married in a strictly legal manner. *Manus* is also a term employed in a more extended sense, to denote every *jus*, as the *jus vendendi* of children; and in this sense it resembled the Ger-

man Mundium. Ulpianus says—"Farreo convenitur in manum certis verbis et testibus X præsentibus et sollemni sacrificio facto, in quo panis quoque farreus adhibetur." Ulp. IX. This statement shows the extremely formal and religious character of this ancient Roman rite. The *potestas* over the wife did not always exist in ancient times. It is incorrect to speak of marriage with manus and marriage without it. Marriage first took place, and then the manus might or might not follow. When the *conventio* in manum was entered into, the woman suffered a *capitis deminutio*, and passed from the *potestas* of her father into that of her husband. The manus brought her into what may be termed a new agnatic circle. When marriage took place without a *conventio* in manum, the wife became simply an *affinis*, but not an agnate. In relation to her children she was in *consanguinæ loco*—a consanguine sister to her own children. If her husband happened to be under the *potestas* of his father, she was to her father-in-law as a grand-daughter, or, as it was expressed, "*neptis loco est.*" The manus gave the husband to a certain extent the right of a judge over his wife. As the rule he had not the *jus vitæ et necis* as it was possessed by a father over his children, and not even in the case of adultery, unless she were taken in the very act. For smaller offences he could sit as judge over her in a kind of *forum domesticum*; but if she were charged with adultery, she was entitled to be tried for the alleged offence, in the presence of her *propinqui*, that is, her relations in the widest acceptation of the term. As to the *jus vendendi*, in ancient times the husband had a right to bring his wife in *mancipio*, just as a father could his child, and there was also an *emancipatio* by which she might be disposed of just the same as in the case of a *filius familias*. But this process was never employed to effect an actual sale, it was only used to obtain the dissolution of the manus. There is not a trace in Roman Law of the actual sale of a wife. As to the *jus noxæ dandi*, when the woman had committed a crime, the husband could not surrender the person of his wife for

her crime, but he might give up the property he had obtained through her. Indeed the woman after the *conventio in manum* was without property. Supposing she had been *sui juris* before her marriage, her husband upon marriage became her universal successor just as in the case of an *arrogatio*. Her property however was liable for her debts, and if the husband refused to pay there was an "*in integrum restitutio*" to compel him to refund. When the woman died *in manum* there could be no succeeding to her estate by inheritance; but when the husband died, she had a right of inheritance in his estate as a child, that is to say, as a daughter. It was different when the marriage was celebrated without *manus*. In this case the *prætor* granted the succession "*unde vi et uxor.*" After the death of the husband the woman's agnatic relationship still continued. In the strict marriage accompanied by *manus*, the wife in the technical language of the Roman Law became a *mater-familias*. A woman married in the freer form might become this, but it always and immediately accompanied the marriage, when upon that event the woman also entered into the "*coemptio in manum.*" From the earliest period of Rome, consent alone (*solo consensu*) was necessary to constitute a legal marriage. But if the *manus* was to supervene, then the marriage must be either by *Confarreatio*, *Coemptio*, or *Usus*. *Confarreatio* was the most solemn form, and was the act of the ecclesiastics in the presence of the *Pontifex Maximus* and ten Roman citizens. There was a sacred ceremony in which white bread was broken, and a solemn blessing pronounced. *Coemptio* was the most frequent form, and when the Romans wish to indicate the *manus*, they speak of *Coemptio*. In this case the man purchased the woman in the presence of five Roman citizens. There were present the *libripens* with a pair of balances, in which he was supposed to weigh the copper employed in the purchase, and the whole ceremony was accompanied by certain solemn formal words. *Boethius* gives the supposed form of question and answer mutually employed by the man and woman. "*Sese in coemendo*

invicem interrogabant, vir ita; an sibi mulier *mater-familias* esse vellet? illa respondebat velle. Item mulier interrogabat: an vir sibi pater-familias esse vellet? ille respondebat velle. Itaque mulier viri conveniebat in manum, et vocabantur hæ nuptiæ per coemptionem et erat mulier mater-familias viro loco filiæ." Boethius ad Top. II. p. 299, 12. Orelli Serv. Æn. IV. 214. But there might be a lex Mancipii, in which the formal words were: "Te ego ex jure quirritium matrem-familias meam esse aio." Huschke Kritik. p. 186. Puchta Instit. vol. iii. pp. 161, 162, note f. It was a self-sale: the woman sold herself to her husband in order to become a mater-familias. If the woman were under a tutor, he must interpose his authority, or if she were a filia-familias, her marriage must be "auctoritate patris."

"Genus enim est, uxor, ejus duæ formæ, una matrumfamilias quæ in manum convenerunt; altera earum quæ tantummodo uxores habentur." Cic. Top. c. 3.

Another form of marriage was that which arose from *usus*. It was founded upon the construction of one of the most important laws of the XII tables which ran thus: "Usus-auctoritas fundi biennium, cæterarum rerum annus esto." It was a species of usucapio, in which the woman became the legal wife of a man, by residing with him for the period of one year. At the end of the year the manus attached to this marriage by usus, and it was in its legal effect as if there had been between the parties a coemptio in manum. It was in the power of the woman to break the usucapio by residing away from her husband for three nights, (*per trinoctium*). But the absence must be for three successive nights of the current year. The usucapio did not run if the woman was absent only on three different occasions. Aulus Gellius has an interesting passage upon the trinoctium. It had been said that when the marriage commenced on the 1st of January, the woman could leave home on the 28th of the following December, and absent herself on the nights of the 28th, 29th, and 30th. Gellius says, No, it could not be so; that the woman must leave on the 27th of the month, as

the marriage year is completed on the first moment of the 31st of December. The beginning and end of the dies civilis is midnight—the sexta hora noctis. At that moment the year, it was argued, was completed at midnight of the 30th, and if the woman left on the 28th, she had only been absent two and a-half nights. Regarding the severing of the marriage relationship, it might be done at any time by mutual consent and without any solemn form. But the manus could only be dissolved by Death, Diffarreatio or Emancipatio. Adultery operated as death—a woman could, when her husband was guilty of infidelity, break the manus, and sever the marriage. “Diffarreatio genus erat sacrificii, quo inter virum et mulierem fiebat dissolutio, Dicta diffareatio quid fiebat farreo libo adhibito.” Paul. ex Festo v. Orelli Inscript. 2648, 2650. When manus was destroyed by emancipatio, the same form was used as in the case of the mancipatio of a filius-familias. The man sold his wife, and the person to whom he sold the woman manumitted her. A manus might be brought about *dicis causa*. The woman allowed herself to be brought under the power of the man, simply for the sake of being afterwards emancipated. This was known as the *coemptio fiduciæ causa*. There was a *pactum fiduciæ* that the man should manumit her the very moment after she was brought in manum. The object to be effected in this case was not to form a permanent relationship with the man, but to break her agnatic bond. The manus was employed for various other objects, as for instance *tutelæ evitandæ causa*. Cicero pro Murena says that it was employed *Sacrorum evitandæ causa*, finally in order to obtain the testamenti factio. In ancient Rome so long as the will was made in the comitium a woman was of course disabled from making a testament. But by the coemptio in manum she got rid of her agnate relations. The passage in which reference was made by Cicero to this subject was inexplicable until the discovery of Gaius. It now does not admit of a doubt, but that in the time of Hadrian manus was entered into for the sake of making a testament.

Cic. pro Murena 12. Cic Topica c. 3. s. 14. Gans Schol. p. 138 et seq. Puchta, vol. iii. p. 160. Gaius i. 49, 108—115b, 118, 136, 137, 142, 148, 150; ii. 86, 90, 96, 98, 139, 159; iii. 3, 14, 24, 40. seq., 83. seq. 114, 163, 199; iv. 80. Boeth. ii. ad Cic. Top. c. 3. s. 13. Gell. iii. 2. sec. 13. x. 23. xviii. 6. sec. 9. Tac. Annal. 4, 16.

109. Sed in potestate quidem et masculi et feminæ esse solent: in manum autem feminæ tantum conveniunt.

109. Persons of both sexes may be under the *potestas*, but women only come in *manum*.

110. Olim itaque tribus modis in manum conveniebant, usu, farreo, coemptione.

110. Formerly women came into *manus* in a threefold manner; by *usus*, by *farreo*, and by *coemptio*.

111. Usu in manum conveniebat quæ anno continuo nupta perseverabat; quæ enim velut annua possessione usucapiebatur, in familiam viri transibat filiæque locum optinebat. Itaque lege duodecim tabularum cautem erat, si qua nollet eo modo in manum mariti convenire, ut quotannis trinotio abesset atque ita usum cuiusque anni interromperet. Set hoc totum jus partim legibus sublatum est, partem ipsa desuetudine obliteratum est.

111. That woman came into *manus* by *usus* who remained at home throughout an entire unbroken year as a married woman, for this woman who, after a year's possession, was held as it were by *usucapio*, passed into the family of her husband and obtained the place of a daughter. Therefore it was provided by the law of the Twelve Tables, that if a woman did not wish in this way to come into the *manus* of her husband, she must absent herself three nights every year, and thus the *usus* of that year would be broken. But the whole of this law (*jus*) is abolished partly by statute, and partly by desuetude.

112. Farreo in manum conveniunt per quoddam genus sacrificii in quo farreus panis adhibetur: unde etiam confarreatio dicitur. Sed complura præterea hujus juris ordinandi gratia cum certis et sollemnibus verbis, præsentibus decem testibus aguntur et fiunt. Quod jus etiam

112. Women come in *manum* through *farreo*, which is a certain kind of religious solemnity in which a loaf of bread is used. whence the ceremony is also called *confarreatio*; but many other things besides are done and observed for the sake of establishing this legal relation

nostris temporibus in usu est: nam flamines majores, id est Diales, Martiales, Quirinales, sicut *reges sacrorum*, nisi sint *confarreatis nuptiis nati*, inaugurari non videmus *confarreatio* (h)

in connection with a fixed solemn form of words in the presence of ten witnesses. This right is also practised in our times; for we see that the flamines majores, *i. e.*, the Diales, Martiales, and Quirinales are not consecrated as *reges sacrorum*, unless they have been born after marriage celebrated by *confarreatio*.

(h) It has been conjectured that the lacuna may be filled up by "q a nupta farreo fit et" (or q ipsum farre fit et). Compare Pliny 18. 3 "Quin in sacris nihil religiosius *confarreationis* vinculo erat novæque nuptæ farreum præferbant." It is thought that by the employment of the term *confarreatio* Gaius refers to the twofold employment of the farreum or cake, as appears to have been the custom (see Dionys. 2. 25) to the offering itself and also to the libum or cake of which the espoused ate at the offering. This seems to explain the use of the term *confarreatio* as in 1. 99. we find the term *adrogatio* used for the triple *rogatio*.

Huschkius proposes to fill up the next gap in the MS. as follows: "nam Flamines majores, id est, Diales, Martiales, Quirinales, item *reges sacrorum* nisi q (qui) *confarreatis nuptiis procreati s (sunt)* fieri nequeunt, *confarreatio* etiam necessaria e. c' (etiam necessaria est, cum) flamen nuptias c'trahit (contrahit). (Rossbach die Rom. Ehe. s. 104 Huschkius, p. 24.)

113. *Coemptio* in manum conveniunt per mancipationem, id est per quandam imaginariam venditionem, adhibitis non minus quam V testibus, civibus Romanis puberibus, item libripende, *asse is sibi emit mulierem, cujus in manum convenit.*

113. Through *coemptio*, women came into *manus*, by means of *mancipatio*, that is a kind of fictitious sale under the supervision of not less than five witnesses, being Roman citizens of full age, and a *libripens*. He into whose *manus* the woman comes purchases her for himself, with an As.

114. Potest autem coemptionem facere mulier non solum cum marito suo, sed etiam cum extraneo: unde aut matrimonii causa facta coemptio dicitur, aut fiduciæ causa. Quæ enim cum marito suo facit coemptionem, ut apud eum filiæ loco sit, dicitur matrimonii causa fecisse coemptionem: quæ vero alterius rei causa facit coemptionem cum viro suo aut cum extraneo, velut tutelæ evitandæ causa, dicitur fiduciæ causa fecisse coemptionem. (i)

114. But a woman may pass through the ceremony of *coemptio*, not only with her husband, but also with a third person, whence a *coemptio* is said to be made either for the sake of marriage (*matrimonii causa*), or for the sake of a trust (*fiduciæ*): for the woman who enters into a *coemptio* with her husband, in order that she may stand related to him as a daughter, is said, in this case, to have concluded the *coemptio* for the sake of marriage (*matrimonii causa*), but on the other hand, she who makes a *coemptio* with her husband, or with a third person, for some other object, as for the sake of avoiding the *tutela* (wardship), is then said to have made the *coemptio* for the sake of a trust.

(i) A distinction is made between *coemptio matrimonii causa*, and the *coemptio fiduciæ causa*. The first took place when a woman wished to enter into the *familia* of her husband in *loco filiæ*; the second, when the woman simply proposed to change her tutor, to make a testament, or some other object. This second mode of *coemptio* might take place even with a husband. (Domenget Gai. 64.)

115. Quod est tale: si qua velit quos habet tutores reponere, ut alium nanciscatur, iis auctoribus coemptionem facit; deinde a coemptionatore remancipata ei cui ipsa velit, et ab eo vindicta manumissa, incipit eum habere tutorem, a quo manumissa est: qui tutor fiduciarius dicitur, sicut inferius apparebit. (j)

115. This is effected as follows: When a woman wishes to remove her present tutors, in order to receive another, she makes a *coemptio* by their authority; then she is again transferred by the coemptionator to him whom she wishes to have as tutor, and having been manumitted by the *vindicta*, she has for a tutor, from this time, the party by whom she was manumitted; he is called a tutor fiduciarius, as will appear hereafter.

(j) The *coemptio fiduciaria* was employed for the fol-

lowing objects: 1. When a woman wished to obtain a change of tutor. 2. In order to enable a woman to make a testament, which was exclusively reserved for the vestal virgins and for women without agnates, at least for those who had not entered into coemptio and been manumitted afterwards. 3. For the extinction of private sacrifices.

When the woman changed her family, entering into a new agnatic circle, she was required to make certain sacred offerings. These were a considerable burden, and in later times they were avoided as much as possible. For this purpose she sold herself in manus. It was usually an old man that was selected, to whom the sale was made with the accessory agreement that he should manumit her. As her universal successor he became entitled to all her property, and thus she was relieved from these sacred duties. The text treats of the two first kinds of coemptio. Cicero has made mention of the third kind. He says, *pro Murena*, sect. xii. “*Mulieres omnes, propter infirmitatem consilii majores in tutorum potestate esse voluerunt: hi invenerunt genera tutorum quæ potestate mulierum confinerentur. Sacra interire illi noluerunt: horum ingenio senes ad coemptiones faciendas, interimendorum sacrorum causa, reperti sunt.*” By *sacra interire* is to be understood the *sacra familiaria*. See *de Leg.* ii. 19. Coemptio transferred all the rights and obligations of the woman to the man who took her in manu. This institution ceased under Justinian, and married women remained in their natural family, preserving all their agnate rights.

115*a*. Olim etiam (*k*) testamenti faciendi gratia fiduciaria fiebat coemptio. Tunc enim non aliter feminæ testamenti faciendi jus habebant, exceptis quibusdam personis, quam si coemptionem fecissent remancipatæque et manumissæ fuissent. Set hanc necessitatem coemptionis faciendæ ex auctoritate divi Hadriani senatus remisit. . . . femina

115*a*. Formerly, a fiduciary coemptio was resorted to for the sake of making a testament. For then, with the exception of certain persons, women had the right of making a testament only, when they had made a coemptio, and had been again transferred and manumitted. But this necessity of making a coemptio the senate has dispensed with, under the authority of Hadrian.

(k) *Olim etiam, etc.* At first the MS. had *Olim olim*. The last *olim* is not simply an erroneous repetition, but is probably a corruption of *q'dem*; so that the text should read "*Olim quidem etiam testamenti faciendi gratia fiduciaria fiebat coemptio.*" Huschke Kritik. p. 25.

115b. *Licet autem mulier fiduciæ causa cum viro suo fecerit coemptionem, nihilominus filiæ loco incipit esse: nam si omnino qualibet ex causa uxor in manu viri sit, placuit eam jura filiæ nancisci.*

115b. But though the woman has made a coemptio with her husband for the sake of the *fiducia*, she is not the less from this time in the place of a daughter, for no matter what may be the reason why the wife is in the *manus* of her husband, it is determined that she then obtains the *jus filiæ*.

116. Superest ut exponamus quæ personæ in mancipio sint. (l)

116. It remains that we speak of those persons who are in *mancipium*.

(l) Mancipium was that new *potestas* which arose by means of the mancipation of a free person from one entitled to exercise the *potestas* or *manus*. It was terminated, like slavery, by manumission. A person who was in *mancipium* had no property of his own, but acquired everything for the person who exercised the *potestas* over him. Hence, Ulpian says: "*Adquiritur autem nobis etiam per eas personas quas in potestate manu mancipiove habemus. Itaque si quid mancipio puta acceperint, aut traditum eis sit, vel stipulati fuerint, ad nos pertinet.*" Ulp. xix. 18. Again, "*Ei qui in potestate manu mancipiove est scripti heredes sub conditione legari potest, ut requiratur, an quo tempore dies legati cedit in potestate heredis non sit.*" Ulp. xxiv. 23. Mancipation could be effected either by a pater-familias or by a man who held a woman in *manum*. An opinion formerly prevailed that a Roman citizen might sell himself by means of mancipatio. It was supposed by some that in ancient Rome a man might pledge himself for his debts, that he

might afterwards sell himself to satisfy his creditor, and that this sale was the original nexum. In the ancient law, nexum being *per æs et libram*, and in this respect resembling *mancipatio*, gave rise to this supposition. Festus s. v. nexum Varro de l. lat. vi. 5. This opinion has been recently defended by Niebuhr, and by Puchta in his earlier writings, but in his later ones rejected as quite untenable. It was also long maintained by Zimmern, and was indeed commonly received by jurists. This view, however, is now universally rejected. The nexi were not in the *mancipium* of their creditors, and indeed nexum was quite a different institution. Nexum, in the most extensive signification of the term, was probably applied to every legal transaction which was effected *per æs et libram*. In the strict and more limited sense it was a term used to denote every contract *per æs et libram*.

Mancipium was an institution strictly limited to the cases of a father selling his child, and a man selling the woman whom he held in *manus*. In the latter case a *mancipium* arose, but only a momentary one, for the husband had no real *jus vendendi* over his wife. It was quite otherwise with the *pater-familias* who sold his child in order to effect an *emancipatio* or a *datio in adoptionem*. In ancient Rome it was undoubtedly a real sale, and was intended to bring the labour and service of the child under the control of the purchaser. But though a father had the *jus vendendi*, and might sell his child, he could not reduce him to the abject condition of slavery. The *liberum caput* remained free and *ingenuus*. He lost neither freedom nor citizenship, but he was said to be in *servi loco*, and his condition was followed by the most important legal consequences. In the first place he suffered a *capitis deminutio* without entering into a new *familia*. He was not a member of the family of his purchaser, not in *fili loco*, but as we have said, in *servi loco*. He could only acquire in a testament as a slave might acquire, by being manumitted for the purpose of being made an heir. His condition, however, was cer-

tainly not that of a slave, for the mancipated child had still left his *existimatio* or public reputation, which was not a mere matter of sentiment, but a status respected by law. Nor had the purchaser any *jus vitæ et necis*, as the father had. All that the man could do who had received the *filius in servi loco* was to make him do the work of a slave, but nothing more, though this was bad enough for a Roman. When the son thus held in *mancipium* contracted debts, his purchaser could be sued for them, just as if he were a slave. There was one striking difference between *manus* and *mancipium*. As no one could bring himself into *mancipium* by selling himself, so there could not be as in *manus* any *universal succession*—that is, any succession to the active and passive obligations of the man. If the son who was held in *mancipium* married and had a son, this son was not under the *potestas* of the purchaser, but under that of his grandfather, just as if the son had never been sold in *mancipium* at all. When a son had been mancipated a third time and begot a child, Labeo and the Proculians held that this child fell under the *potestas* of the purchaser; but the Sabinians maintained that he was either *sui juris*, or under the *potestas* of his father. They held that he was *sui juris* if the father had died in *mancipium*, but that if his father had been manumitted after the *mancipatio*, the son then fell under the *potestas* of his father. If it were a grandson that was sold, what app'ied to the son after the third mancipation was held to apply also to the grandson.

The destruction of the *mancipium* was different from that of the *manus*. The death of the purchaser did not dissolve the *mancipatio*, but the right survived to his heir. The right was more a right of property than a family right. The *liberum caput* might be manumitted by testament, by the census, or by the *vindicta*, without the least impediment. Or he could inscribe himself in the census without the intervention, and even against the will of his purchaser. It was not a solemn form, but was simply required to be done "*dicis causa*." The *filius in mancipio*, could not, however, free

himself from the *mancipatio* if he had been brought into this condition either *fiduciæ causâ*, or *noxali causa*.

Gai. i. 48 & 49, 116, 123, 132, 135, 138—141; ii. 86, 90, 160; iii. 114; iv. 80. Vat. Frag. secs. 51. 300. Val. Max, ii. sec. 3. Puchta. iii. p. 163.

117. Omnes igitur liberorum personæ, sive masculini sive feminini sexus quæ in potestate parentis sunt, mancipari ab hoc eodem modo possunt, quo etiam servi mancipari possunt. (m)

117. Thus all children of both sexes, who are under the *potestas* of their father, may also be transferred by *mancipatio*, in the same manner as slaves are *mancipated*.

(m) Free persons may be brought into *mancipium* in precisely the same manner as slaves. The way in which this was accomplished is fully set forth in section 119.

118. Idem juris est in earum personis quæ in manu sunt. Nam feminæ a coemptionatoribus eodem modo possunt mancipari quo liberi a parente mancipantur; adeo quidem, ut quamvis ea sola aput coemptionatorem filiæ loco sit quæ ei nupta sit, tamen nihilo minus etiam quæ ei nupta non sit, nec ob id filiæ loco sit, ab eo mancipari possit. (n)

118. The same rule of law prevails in reference to the persons of those who are in *manus*; for women may be *mancipated* by the *coemptionator* in the same way as children are transferred by *mancipatio*, from the father, so that, although only that woman may stand related to the *coemptionator* as a daughter who is married to him, yet she who is not married to him, and who on that ground does not stand to him in the place of a daughter, may however be *mancipated* by him.

(n) We must understand this section to mean that not only married women who are *in manu mariti* by *usus*, by *confarreatio*, or by *coemptio*, may be given in *mancipium*, but also those who are in a *coemptio fiduciaria*. It will be seen by section 123 that the condition of a woman who was given in *coemptio* differed from that of a person in *mancipio*. The woman in *manum* was not *in loco servæ*, whilst the person in *mancipio* was.

118*t*. Pleramque solum et a parentibus et a coemptionatoribus mancipantur, cum velint parentes coemptionatoresque *e* suo jure eas personas dimittere, sicut inferius evidentius apparebit.

118*t*. Women are mancipated generally only by their agnate ascendants, (a parentibus) and by their coemptionatores, when the agnate ascendants and coemptionatores wish to dismiss these persons from their power; as will appear more clearly further on.

119. Est autem mancipatio, ut supra quoque diximus, imaginaria quedam ven litio: quod et ipsum jus proprium civium Romanorum est. Eaque res ita agitur. Adhibitis non minus quam quinque testibus civibus Romanis puberibus, et præterea alio ejusdem condicionis qui libram æneam teneat, qui appellatur libripens, is qui mancipio accipit rem, æs tenens ita dicit: HUNC EGO HOMINEM EX JURE QUIRITIUM MEUM ESSE AIO, ISQUE MIHI EMPtus EST HOC ÆRE ÆNEAQUE LIBRA: deinde ære percutit libram, idque æs dat ei a quo mancipio accipit, quasi pretii loco. (o)

119. But mancipation is, as we have already said, a fictitious sale; which legal form is peculiar to the Roman people; the ceremony takes place as follows: there must be present not less than five Roman citizens of full age as witnesses, with another person of the same legal status, who holds a copper balance, and is called the *libripens* (balance-holder); he who receives in mancipation, holding the copper, thus speaks, "I declare that this slave is mine *ex jure Quiritium*. I have bought him with this copper, and by means of this copper balance;" afterwards, he strikes the balance with the copper, which he gives to the party who makes the conveyance, as an earnest of the price.

(o) *Is qui mancipio accipit rem, æs tenens ita dicit.* In Boethius, instead of the word *rem* we find the word *æs*, but both words must be retained as in the text. Varro has *æs tenens, assem tenentes*. Bocking observes, Gai. i. 121. "Rei præsentiam ne necessariam quidem esse." Both the *hunc ego hominem* and the *hoc ære* in the formula following, need to be set forth by a previous explanation, and the thing which is the subject of the mancipation should be referred to at the very commencement of the ceremony: compare Gai. ii. 24. "Is cui res in jure ceditur." Not merely as Varro says, De L. L. 9. 49. sec. 83. "Pro assibus nonnunquam æs dicebant antiqui, a quo dicimus assem tenentes: *hoc ære æneaque libra*," but it was plainly essential for the mancipation, that the mancipio acci-

piens should so present himself as claiming the ownership of the imaginary purchase money which was about to be paid, in order that the other party might legally acquire the thing thus exhibited. It was similar also in the *jure cessio*, where the person endeavouring to recover his property by the form of action known as the *vindicatio*, indicated his property in the thing by laying fast hold of it. Lachmann, noticing and contrasting *mancipatio* and *in jure cessio* on this point, argues for the reading *rem tenens* in the present paragraph. On the other hand it should be noted that the laying hold of the thing as a sign of ownership was not always necessary in conveyance by *mancipatio*, since it was only possible with moveable things, in which case the claimant might say *hanc ego rem*. With respect to immoveable things and prædial servitudes, the claimant, if he did not happen to be on the spot, said, for example, “*fundum Cornelianum ego*, etc.” In the present section Gaius does not speak of all the requisites and forms in *mancipatio* generally; these he refers to and expressly discusses in sec. 121, where he does not use, as in this section, the word *tenere*, but since the *mancipio accipiens* must always in the first place acquire the possession, he more correctly employs the words *apprehendere* and *capere*. On the other hand, the expression *rem tenere* or *apprehendere* can never fail in *jure cessio* since distant objects which could not be brought into court *en masse*, could be represented by some part or portion of the thing claimed. Gai. iv. 17. Huschke Kritik. pp. 26, 27.

120. Eo modo et serviles et liberæ personæ mancipantur. (p) Animalia quoque quæ mancipi sunt, (q) quo in numero habentur boves, equi, muli, asini; item prædia tam urbana quam rustica quæ et ipsa mancipi sunt, qualia sunt Italica, eodem modo solent mancipari.

120. Free men and slaves are thus conveyed by *mancipatio*, also animals which are *mancipi*, such as oxen, horses, mules, asses; also *prædia urbana*, and *prædia rustica*, which are *res mancipi*; such as belong to Italy, are usually conveyed in the same manner.

(p) Whilst those persons who were submitted to the man-

cipium were *in loco servi*, this condition did not reduce them to a state of actual slavery. No price would suffice to purchase a free man. Hence Paulus says, “Qui contemplatione extremæ necessitatis aut alimentorum gratia filios suos vendiderint, statui ingemitatis eorum non prejudicant: *homo enim liber nullo pretio æstimatur.*” Paul. Sent. lib. V. tit. i. sec. 1. All the property acquired by a person in the mancipium of another was acquired for that person. Gaius ii. sec. 90. Marriage was not dissolved by a person being reduced to the condition of mancipium. Finally, it was permitted to no one to outrage a person held in mancipium. It was often the case that a person in this condition was held only for a moment, in order to accomplish some new legal result, except in the case where the person had been abandoned in a noxal action. Gai. i. sec. 141.

(q) *Res Mancipi* and *nec Mancipi*. This distinction was one of great importance in the ancient law, but ceased to be such in the time of Justinian, and consequently in the modern civil law. What *res Mancipi* and *nec Mancipi* were, is very clearly set forth by Ulpianus. He says, “Omnes res aut Mancipi sunt, aut nec Mancipi. Mancipi res sunt prædia in Italico solo, tam rustica, qualis est fundus, quam urbana, qualis domus. Item jura prædiærum rusticorum, veluti via, iter, actus, et aquæductus. Item servi et quadrupedes quæ dorso collove domantur, veluti boves, muli, equi, asini. Ceteræ res nec Mancipi sunt. Elephanti et cameli, quamvis collo dorsove domentur, nec Mancipi sunt, quoniam bestiarum numero sunt.” Ulp. Frag. xix. sec. 1.

Res Mancipi were those things which could only be transferred in full ownership, by a formal civil conveyance. The transfer must be either by *mancipatio* or in *jure cessio*. It should be observed, that it is not the correct test to say that they were things conveyed by *mancipatio* simply.

The mere tradition of such objects as Ulpianus enumerates never gave the quiritarian right, but only conferred bonitarian ownership. The receiver by tradition, might get the use of the thing, but what, in our modern law is called the

legal estate still remained with the original owner. In the case of *res nec mancipi* as the rule, simple delivery transferred the entire ownership of the thing. To *res mancipi* belonged, 1. The Italian soil. 2. Slaves. 3. Domestic cattle and beasts of burden—"animalia quæ dorso collove domantur." 4. Servitudes prædiorum rusticorum. All other things were placed among the *res nec mancipi*. It is probable that in ancient Rome the *res mancipi* were those things which constituted the property of a Roman householder, the house with its surroundings and appurtenances. It is also highly probable that this distinction of *res mancipi* and *nec mancipi* was as old as the Servian constitution, and that the distinction stood in close connection with the Census. It was the *res mancipi* most probably, that were regarded in fixing the five classes of Roman citizens. Hence the importance of strictly defining the *res mancipi*. There was, no doubt, a political reason; and the State as well as the individual having an interest in the matter, it became of importance that the *res mancipi* should be exactly described. In relation to this subject Dr. Maine says: "The explanation which appears to cover the greater number of instances is, that the objects of enjoyment honoured above the rest were the forms of property known first and earliest to each particular *community*." This statement would be correct, if instead of *community* the writer had said *family*. Again, Dr. Maine is not quite correct when he describes *res mancipi* as "things which require a mancipation," and *res nec mancipi*, as "things which did not require a mancipation," or the "bare delivery of the article." It is well known that *res mancipi* might be conveyed by the form known as *in jure cessio*, and that *res nec mancipi* did not always require tradition. "Sed jura prædiorum urbanorum in jure tantum cedi possunt, rusticorum vero etiam mancipari possunt." Gai. ii. 29; Instit. R. L. pp. 21, 22; Puchta's Instit. ii. p. 643 et seq.; Maine's Anc. Law. p. 277. et. seq.

121. In eo solo prædiorum mancipatione a ceterorum mancipatione differt

121. The mancipation of estates (*oppositio*) differs from the mancipa-

quod personæ serviles et liberae, item animalia quæ mancipi sunt, nisi in præsentia sint, mancipari non possunt: adeo quidem, ut eum qui mancipio accipit adprehendere id ipsum quod ei mancipio datur necesse sit: unde etiam mancipatio dicitur, quia manu res capitur. Prædia vero absentia solent mancipari.

tion of other things in this respect only, that free persons and slaves, as well as animals that are *res mancipi*, cannot be conveyed by mancipation, unless they are present; so that indeed, he who receives in *mancipium* ought to grasp the thing itself, which is given him by *mancipium*; hence it is called *mancipatio*, because the thing is held in the hand (*manu capitur*). But estates at a distance are accustomed to be conveyed by mancipation.

122. Ideo autem æs et libra adhibetur, quia olim æreis tantum nummis utebantur; et erant asses, dupondii semisses et quadrantes, nec ullus aureus vel argenteus nummus in usu erat, sicut ex lege XII tabularum intelligere possumus; eorumque nummorum vis et potestas non in numero erat, sed in pondere nummorum. Veluti asses librales erant, et dupondii tum erant bilibres; unde etiam dupondius dictus est quasi duo pondo: quod nomen adhuc in usu retinetur. Semisses quoque et quadrantes pro rata scilicet portione librae æris habebant certum pondus. Item qui dabant olim pecuniam (r) non adnumerabant eam, sed appendebant. Unde servi quibus permittitur administratio pecuniae dispensatores (s) appellati sunt et adhuc appellantur.

122. Thus copper and the balance are employed, because formerly only copper money was in use; and these pieces consisted of *asses*, *dupondii*, *semisses*, and *quadrantes*, nor was there any gold or silver money in use, as we may ascertain by the law of the Twelve Tables; the value of these pieces did not consist in their number, but in their weight, thus the *as* weighed a pound, and the *dupondii* at that time two pounds, whence also it was called *dupondius*, as it were, *duo pondi*, a name retained in use till the present day. Also the *semisses* and the *quadrantes* had a fixed weight, that is to say, a certain portion of the pound of copper. Hence when a payment was to be made, at that time the money was not counted out but weighed. Therefore those slaves to whom the administration of money matters was appointed, were called *dispensatores*, and are still so called.

(r) *Item qui dabant olim pecuniam, etc.* This is the reading of Huschke; Lachmann had proposed to read “qui dabat pecuniam præsentem.” The MS. appears to have *dabant*, which has been restored to the text. *Dabant* appears subsequently to have been changed into *adnumerabant* and ap-

pendebant. Lachmann's reading is certainly incorrect. Why should the word "præsentem" be introduced, since nothing but current money could be used in the transaction? Isidorus, in his Orig. x. p. 1072, 38, seems to quote from the present passage. He says, "Quia prius qui dabant pecuniam non numerabant eam, sed appen ebant." Huschke Kritik. p. 26. Varro de L. L. v. 183.

(s) *Dispensatores*. These persons were often slaves authorised to keep accounts of the receipts and expenditure of the house, or to take the oversight and management of the income. In Roman families of importance the dispensator was the chamberlain of the household, discharging the duties of a modern steward, as far as the latter has charge of accounts. In later law the term was applied to the steward of the imperial revenue, and to the "dispensator pauperum," who was the "œconomus ecclesiæ," or in modern phrase, the overseer of the poor. L. 16. D. de servo (11. 3.); l. 12. D. de instit. act. (14. 3.); l. 141. sec. 4. D.; de verb. oblig. (45. 1.); l. 51. 62. D.; de solut. et liber. (46. 3.) "Dispensatorem meum testamento liberum esse jussi, et peculium ei legavi: is post mortem a debitoribus pecunias exegit; an heres meus retinere ex peculio ejus, quod exegit, possit, queritur." l. 1. Cod. 2. 37.; l. 4. Cod. 4. 21.; l. 33. sec. 4. Cod. 1. 3. "Dispensatorem pauperum, id est œconomum ecclesiæ."

123. Si tamen querat aliquis, (*l*) quare citra coemptionem feminae etiam mancipientur: ea quidem quæ coemptionem facit, non deducitur in servilem condicionem, a parentibus vero et a coemptionatoribus mancipati mancipataeque servorum loco constituuntur, adeo quidem, ut ab eo cujus in mancipio sunt neque hereditatem neque legata aliter capere possint, quam si simul eodem testamento liberi esse jubeantur, sicuti juris est in persona servorum. Sed dif-

123. If any one wishes still to enquire why women are mancipated without coemption . . . she indeed who makes a *coemptio* is not reduced into a servile condition, but those persons who are mancipated by their agnate ascendants or by coemptionators are held in the condition of slaves; so much so that they can neither receive an inheritance nor a legacy from those who have them in *mancipium*, except so far as they receive at the same time their freedom by the same

ferentiæ ratio manifesta est, cum a parentibus et a coemptionatoribus iisdem verbis mancipio accipiuntur quibus servi; quod non similiter fit in coemptione.

testament. Such is the rule of law in regard to the persons of slaves. But the reason of this difference is manifest, since they are received in *mancipium* by their agnate *ascendants* and by their *coemptionatores* with the same words as slaves are, but a different form is adopted in coemption.

(t) *Si tamen aliquis, quare citra coemptionem feminæ etiam mancipientur ea quidem, etc.* Huschke finds a difficulty in making the text fit in with what comes afterwards. *Citra* he says, is used by the juridical writers in the sense of *without* or *apart from*. Take it in which sense you please, he affirms that Gaius gives no answer to the question. The passage asks a question respecting the different workings of coemptio and mancipatio, upon both of which Gaius has spoken in sections 113 and 120, that they consist in an *imaginaria venditio* and on the part of the person who acquires they give rise to an *emere*. Since the word is never used by Gaius to express transition, Huschke considers that it is a corrupt reading.

Towards the end of the section, also, the reading “sed differentiæ” from its connexion seems to require the insertion of *et*. It should read “sed et differentiæ.” Huschke Kritik. p. 27.

124. Videamus nunc, quibus modis si qui alieno juri subjecti sunt eo jure liberentur.

124. Let us now enquire into the different ways in which persons under the power of another, (alieno juri) are freed from it.

125. Ac prius de his dispiciamus qui in potestate sunt. (u)

125. And first we will consider those who are under the *potestas*.

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(u) *Qui in potestate sunt.* The most important distinction of the patria potestas is, that it is a *jus* appertaining to the father combined with an *imperium domesticum*. To

make this clear, attention should be given to the following remarks. The Romans always regarded—though in this they were in error—the *patria potestas* as an institution peculiarly their own; they believed that it appertained to the *jus civile*, or the strict national law of the Romans, and not to the *jus gentium*. Both the father and the son were required to be *cives Romani*, since only a Roman citizen could have the *potestas* over his child, and none but a *civis Romanus* could be under the *potestas* of another. Thus when the mother was a *Latina*, although the father might be a *civis Romanus*, his child was not under his *potestas*. The *jus* acquired by the *patria potestas* related partly to the person and partly to the property of the *filius*. The father had, by virtue of it, the *jus vitæ et necis*; the right to appoint a tutor to his son by testament; the right of pupillary substitution; the right of consenting to his marriage; the *actio de patria potestate*; and the *interdictio de liberis ducendis*. In relation to the child's property, the right of the father related to his *peculium*. According to the ancient law, every acquisition made by a son fell to the father *ipso jure*. In later law the child owned the acquisitions which he made; but from this was excepted his acquisitions *ex substantia patris*.

This right of the *potestas* over the child was one of such great importance and scope, that some of the ablest jurists have supposed that it involved an absolute dominion over the child. Such for instance was the opinion of Heineccius, who says, “*Erant enim liberi in Domino juris Quiritium et hinc poterant vindicari . . . Mancipabantur etiam, tanquam res mancipi.*” If such had been the case, the remarks of Bynkershoek would have been true. “*Imo durior quodammodo apud Romanos erat liberorum, quam ipsorum servorum conditio.*” Without doubt, so great and influential was this power, that it was not inaptly called *patria majestas*. Dionysius says that Romulus was its author, by which we must understand that it dates back to the earliest period of Rome. The ancient and modern ju-

rists, however—and among the latter may be mentioned Hugo, Zimmern, Walther, Puchta, Klenza, for many years editor of the *Zeitung von Rechtswissenschaft* (Journal of Jurisprudence), and Von Vangerow—are of opinion, that there never existed such a right of property over the child. Muhlénbruch also in his remarks upon the passage quoted from Heineccius says, “at non tanquam res filii familias possidebuntur, quemadmodum servi.”

A Roman child was born “*ingenuus*” and free. He was his own property, and could not be brought into commercium by another. All the dignities and offices of the state were open to his ambition, and the right possessed by the father over the son was of quite a different character from that which the owner possessed over the slave. The father had, as before observed, the *jus vitæ et necis*; he had also the “*jus noxæ dandi*,” since actions on tort—*actiones noxales*—might be instituted against the father for the delict of the son. Justinian however abolished this, after which the father was held responsible only for his own crime. The father had the right of vindicating his child—“*quod meum est, etc.*”—in the usual form of *vindicatio*. If we could understand the “*jus vitæ et necis*” in the sense that a father had the right to murder his child, then we might possibly admit the erroneous opinion that the father had a right of property in him. All however that the father had was an *imperium domesticum*—he was supreme criminal judge, and could pronounce judgment at his own tribunal.

In relation to the *jus vendendi*, if the father could have sold his son as a slave, it might then be admitted that he had a right of property in him. But this he could never do. He might sell his son, but the son did not cease to be *ingenuus*, nor did he cease to be a *civis Romanus*. All that the father could do was to bring his son under a new potestas. The new pater did not become owner of the son any more than the natural father had been. When the father vindicated his child he must do it as his son. There was the greatest difference between the *filium vindicare* and

the rem vindicare. Ulpianus says, "Si quis ita petit filium suum vel in potestate ex jure Romano, videtur mihi et Pomponius consentire, recte eum egisse; ait enim, *adjecta causa* ex lege Quiritium vindicare posse." L. i. s. 2. Dig. de rei. vind. (6. 1.) The phrase *adjecta causa* may be used to express a new ground of action; thus, a postea adquisitum dominum would make it valid. But the vindicatio may be employed for the purpose of gaining possession of a slave or a free person *in libertatem vindicatio*, as for example a son *in potestate*, in which case *adjecta causa* is equivalent to *secundum suam causam*. "Secundum suam causam sicut dixi esse tibi vindictam." When Ulpianus uses the words *adjecta causa* he means that the father must vindicate his son *as a son* and not as a slave.

There were three grounds on which the patria potestas might rest: 1. Conception in justas nuptias, or by adoption and arrogation. 2. Causæ probatio. 3. Legitimatio per subsequens matrimonium. In the first case there must have been a legitimum matrimonium. The second was the case of the anniculus ex lege Ælia Sentia, and also the case of the erroris causæ probatio ex senatus-consulto. Gai. i. 29—32. 66—75. The third case arose from an ordinance of Constantine which legitimated the children of a Roman and his concubine, when there was subsequently a legal marriage between the parties. Ulpianus says, "In potestate sunt liberi parentum ex justo matrimonio nati." Ulp. V. s. 1. In this case there must be the connubium between the man and the woman, and the justum matrimonium must have existed at the moment of conception, and the father must also be a civis Romanus.

The legitimatio per subsequens matrimonium was an institution created by Constantine. He did not establish it as a permanent institution, but granted it as a privilege for a certain number of years. The Emperors Zeno and Anastasius followed in his track, and extended the time, but Justinian was the first emperor who permanently established the legitimatio. The Emperor Zeno in his constitution

referring to this law says, “*Divi Constantini, qui veneranda Christianorum fide Romanum munivit imperium, super ingenuis concubinis ducendis uxoribus, filiis quin etiam ex iisdem vel ante matrimonium vel postea progenitis suis ac legitimis habendis, sacratissimam constitutionem renovantes jubemus eos, qui ante hanc legem, ingenuarum mulierum (nuptiis minime intercedentibus) electo contubernio, cujuslibet sexus filios procreaverint, quibus nulla videlicet uxor est, nulla ex justo matrimonio legitima proles suscepta, si voluerint eas uxores ducere quæ antea fuerant concubinæ, etc.*” L. 5. 6. 7. Cod. de natural. lib. (5. 27). By the *Lex Julia et Papia Poppæa* concubinage, if not sanctioned, was endured and protected. It was not considered a delict, and the children born from the connexion were under the protection of the law. The obvious intention of thus conniving at such alliances was to increase the population of the empire, which had been so terribly reduced by the destructive civil wars.

Justinian ordained that a man who was not in a position to avail himself of the *legitimatio per subsequens matrimonium* should, upon application to the emperor, obtain upon his petition a *rescriptum principis* enabling him to secure the same privileges. The *patria potestas* was dissolved:

1. If the *paterfamilias* died or suffered a *capitis deminutio*, maxima, or media.
2. If the child subjected to the same died or suffered a *capitis deminutio*.
3. If the *filius* were advanced to a high dignity in the state.
4. If the father became a party to the prostitution of his daughter or exposed his child.
5. When a *paterfamilias* entered into arrogation, in which case the arrogator obtained the *patria potestas*.
6. When by means of *adoptio* the *potestas* was transferred to a *pater adoptans*.
7. When the *filius* was emancipated.

Emancipation was a public transaction in which the father expressed his intention to dissolve the *potestas* with the intention of his son becoming *sui juris*.

Hein. lib. I. tit. ix. sec. 2. Savigny *Recht des Besitzes*, sec. 26. p. 358. ed. vi. Puchta, vol. ii. sec. 161. m. 175. ii.

iii. 132. C. Plin. Epis. lib. x. 6. Mos. et Rom. Legum. Collat. xvi. 2. 3. 5. Von Vangerow Latini Juniani, p. 174. L. 2. Cod. de inf. expos. (8. 52.)

126. Et quidem servi quemadmodum potestate liberentur, ex his intelligere possumus quæ de servis manumittendis superius exposuimus.

126. How slaves are freed from the power of their masters (*potestas*) may be learned from what we have already set forth with regard to manumission. (c)

JUST. i. 12. pr.

(v) Gai. I. sec. 13 et seq.

127. Hi vero qui in potestate (w) parentis sunt mortuo eo sui juris fiunt. Sed hoc distinctionem recipit. Nam mortuo patre sane omnimodo filii filiæve sui juris efficiuntur. Mortuo vero avo non omnimodo nepotes neptesque sui juris fiunt, sed ita, si post mortem avi in patris sui potestatem recasuri non sunt. Itaque si moriente avo pater eorum et vivat et in potestate patris fuerit, tunc post obitum avi in potestate patris sui fiunt; si vero is, quo tempore avus moritur, aut iam mortuus est, aut exiit de potestate patris, tunc hi, quia in potestatem ejus cadere non possunt, sui juris fiunt.

127. Those who are under the *potestas* of a parent become *sui juris* at his death. But this rule, however, admits of a distinction. For when a father dies his sons and daughters become undoubtedly independent (*sui juris*); but when a grandfather dies, his grandchildren do not necessarily become *sui juris*, but only if after the grandfather's death, they do not fall under the *potestas* of their father. Therefore, if their father is living at their grandfather's death, and was under the *potestas* of his father, then, on the grandfather's death, they become subject to the *potestas* of their own father; but if at the time their grandfather dies, their father is either already dead, or has passed from under the *potestas* of his father, then the grandchildren, because they cannot fall under the *potestas* of their father, become *sui juris*.

(w) Compare pr. Inst. "quibus modis jus potestatis solvitur," 1. 12. Also Ulp. x. 2. "Morte patris filius et filia sui juris fiunt: mortem autem avi nepotes ita demum sui juris fiunt: si post mortem avi in potestate patris futuri

non sunt, veluti si moriente avo pater eorum aut etiam decessit aut de potestate dimissus est ; nam si mortis avi tempore pater eorum in potestate ejus fit, mortuo avo in patri, sui potestate fiunt."

128. Cum autem is cui ob aliquod maleficium ex lege penali aqua et igni interdicatur civitatem Romanam amittat, sequitur, ut qui eo modo ex numero civium Romanorum tollitur, proinde ac mortuo eo desinant liberi in potestate eius esse: nec enim ratio patitur ut peregrinæ conditionis homo civem Romanum in potestate habeat. Pari ratione et si ei qui in potestate parentis sit aqua et igni interdictum fuerit, desinit in potestate parentis esse, quia æque ratio non patitur, ut peregrinæ conditionis homo in potestate sit civis Romani parentis. (1)

128. But since a man who is convicted of crime, and is punished by the *aquæ et ignis interdictio*, loses the Roman *civitas*, it follows, that the children of a person thus struck out from the number of the citizens cease to be under his *potestas* exactly as if he were dead, for it is not according to the analogy of our law, that a man who has the legal status of a peregrinus should hold a Roman citizen under his *potestas*. According to the same principle, when a child, under the *potestas* of his father is condemned to the *aquæ et ignis interdictio*, he ceases to be under the *potestas* of his father, because our legal principles do not admit that a man in the status of a peregrinus should be under the *potestas* of a Roman citizen.

(x) The patria potestas was at an end when the father or son was placed under the *interdictio aquæ et ignis*. This is only one particular case of the loss of the civitas. A man who was not a Roman citizen could neither be the subject nor the object of the potestas. The "*aquæ et ignis interdictio*" was that exilium by which the *caput* or citizenship of the offender was taken away. This sentence, to which Cicero adds the *interdictio tecti*, was equivalent to the deprivation of the chief necessities of life, and its effect was to incapacitate a person from exercising the rights of a citizen within the limits comprised in the sentence. "*Aqua et ignis*," says Festus, "*sunt duo elementa quæ humanam vitam maxime continent.*" Cicero Pro. Domo. c. 33. Art. "Banishment." Smith's Gr. and Rom. Antiquities.

“Si patri vel filio aqua et igni interdictum sit patria potestas tollitur.” Ulp. x. s. 3.

The *relegatus* was one who had been forbidden to live in a certain province or in Rome. This did not involve the loss of the *civitas*; hence Ovid says in his *Tristia*, notwithstanding that he sorely pined under his relegation,

Nec vitam, nec opes, nec jus mihi civis ademit,
Nil nisi me patriis jussit abesse focis,
Ipse RELEGATI NON EXSULIS utitur in me
Nomine: tuta suo judice causa mea est.

Trist. V. Eleg. v. 11. et seq.

Justinian says, “A father who is banished by relegation retains the *patria potestas*,” and he adds a similar remark in regard to the child.

Exsilium was not inflicted as a punishment, but was rather had recourse to by the citizen who was in peril to avoid threatening personal danger. The fine description of Cicero is worth remembering; “*Exsilium enim, non supplicium est, sed perflugium portusque supplicii. Nam qui volunt pœnam aliquam subterfugere, aut calamitatem eo solum vertunt; hoc est, sedem ac locum mutant. Itaque nulla in lege nostra reperietur, ut apud ceteras civitates, malefícium ullum exsilio esse multatum: sed cum homines, vincula nece, ignominiasque vitant, quæ sunt legibus constitutæ, confugiunt quasi ad aram, in exsilium.*” Cic. Pro. Cæcina, c. 34.

129. Quod si ab hostibus captus fuerit parens, quamvis servus interim hostium fiat, pendet jus liberorum propter jus postliminii, quia hi qui ab hostibus capti sunt, si reversi fuerint, omnia pristina jura recipiunt. Itaque reversus habebit liberos in potestate. Si vero illic mortuus sit, erunt quidem liberi sui juris; sed utrum ex hoc tempore quo mortuus est aput hostes parens, an ex illo quo ab hostibus captus est, dubitari

129. But if the agnate ascendant is taken prisoner by the enemy, although he becomes the slave of the enemy during his captivity, his power over his children is only suspended, on account of the *jus postliminium*, for captives, when they return, are restored to all their former rights; therefore, on his return, the father will have his children under his *potestas*: if on the other hand he dies in captivity the children will

potest. Ipse quoque filius neposve si ab hostibus captus fuerit, similiter dicemus propter jus postliminii potestatem quoque parentis in suspenso esse. (y)

then be *sui juris*, but whether they would be *sui juris* from the period of their father's captivity, or from that of his decease may be a question open to doubt. So, too, if a son, or a grandson is taken prisoner, the *potestas* of the parent, by reason of the *jus postliminium* is only in suspense.

JUST. I. 12. 5.

(y) Ulpianus says, "Si pater ab hostibus captus sit, quamvis servus hostium fiat, tamen cum reversus fuerit, omnia pristina jura recepit jure postliminii. Sed quamdiu apud hostes est, patria potestas in filio ejus interim pendebit; et cum reversus fuerit ab hostibus, in potestate filium habebit; si vero ibi decesserit, sui juris filius erit. Filius quoque si captus fuerit ab hostibus, similiter propter jus postliminii patria potestas interim pendebit." Ulp. x. s. 4.

130. Præterea exeunt liberi virilis sexus de patris potestate si flamines Diales inaugurentur, et feminini sexus si virgines Vestales capiuntur.

130. Moreover, children of the male sex cease to be under the *potestas* of their father, when they are inaugurated as *Flamines Diales*; and females, when they are received as *Vestal Virgins*. (z)

(z) The elevation of a *filius-familias* to the dignity of a *Flamen dialis*, the highest order of the priesthood, or of a *filia-familias* to the dignity of a *vestal virgin*, had the effect of terminating the *potestas*. The *filius-familias* who became a soldier, a senator, or consul, still remained under the *potestas*. But the supreme dignity of the patriciate, an office created by Constantine, the office of bishop, and that of consul in the time of Justinian, dissolved the *patria potestas*. "Qui enim omnium sunt spirituales patres, quomodo sub aliorum potestate consistent?" Nov. 81. 3. The same rule did ~~not~~ apply to the pretorian prefect, to the *Quæstor* of the palace, nor to the master or commander of the cavalry and infantry who were ~~not~~ relieved, on account of their offices, from the

potestas. Moreover those who were clothed with these dignities did not on that account lose their family rights.

“Si quis igitur vel summum patriciatus honorem fuerit consecutus, sive insulis consulatus honorarii aut ordinarii fuerit ampliatus, . . . is gaudeat, se hujusmodi conditionis esse exsortem et liberum cum suis facultatibus suaque posteritate, etc.” L. 66. Cod. de decurionibus (10. 31.)

131. Olim quoque, quo tempore populus Romanus in Latinas regiones colonias deducebat, qui jussu parentis projecti erant in Latinam coloniam, e patria potestate exire videbantur, cum qui ita civitate Romana cesserant acciperentur alterius civitatis cives. (a)

131. Also formerly, at the time that the Roman people founded colonies in the Latin community, those who, upon the order of their father went to the Latin districts, were considered as removed from his *potestas*, because when they thus relinquished the Roman *civitas*, they were received as citizens of another state.

(a) The text follows Huschke's earlier edition; in his later edition he says, “Ad censum restitui, sed paulo accuratius quam.” Studien, l. 201. His new reading is as follows: “Olim quidem, quo tempore populus Romanus in Latinas regiones colonias deducebat, qui jussu parentis projectus erat in Latinam coloniam, et ipse ex potestate exibit, cum qui ita civitate Romana cesserant, acciperentur alterius civitatis cives.” The old inhabitants of Latium, while they continued confederates of Rome under the Cassian treaty, stood in a special and favoured social relation to that city. But as to their private rights, they were only regarded as peregrini, and were thus admitted neither to the commercium, nor to the connubium, with Roman citizens. Niebuhr was of opinion that they had the connubium, but in this he was mistaken. All these Latini, however, before the commencement of the empire, and in consequence of the social war, became Roman citizens, and their cities municipii—that is, Italian towns having their own laws and their own magistrates, while they themselves possessed the

rights of Roman citizens. Besides these, other Latini sprang up, namely, the citizens of the Latin colonies. The relation of these to the state, was patterned after that which the veteres Latini had sustained. Their private legal relations were not identical with those of the old Latini, which resembled those of the peregrini, but they occupied a position between these and Roman citizenship. The ancient right of the commercium, accompanied with all its important results, was conceded to them with Roman forms. The commercium was granted to these Latin colonists, not as a privilege, as Savigny affirms, but as the common right of them all. The relations of these Latini colonarii in the domain of private law, were not however fashioned, as Niebuhr affirms, upon a debased and more recent model—a *Latium minus*, as he calls it, for none such existed; the lex Junia did not take any such as its pattern in determining the legal condition of the Latini Juniani. Nor must we suppose that from that time there arose an intermediate state between the civis Romanus and the peregrinus, possessing a double element, being made to resemble partly the Latini Colonarii and partly the Latini Juniani. The legal condition of both kinds of Latini was very similar, but there were some marked and important points of difference in the case of the Latini Juniani. See note on sec. 22. Von Vangerow's Latini Juniani. sec. 21. pp. 107, 108. Niebuhr vol. ii. on the Franchise of the Latins. Savigny Ueber die Entstehung und Fortbildung der Latinitaet. vol. iv. 2. Berlin, 1823. Cic. Pro. Cæcina. cap. 33, 34. Pro. Domo. cap. 30. Pro. Balbo. cap. 11—13. Gai. i. 79.

132. Emancipatione quoque desinunt liberi in potestatem parentum esse. (b) Sed filius quidem tertia demum mancipatione ceteri vero liberi, sive masculini sexus sive feminini, una mancipatione exeunt de parentum potestate: lex enim XII tantum in persona filii de tribus mancipationibus loquitur, his verbis: SI PATER

132. Children, also cease to be under the *potestas* of their parents by emancipation. But the son only becomes *sui juris* after the third mancipation, other descendants whether male or female, are removed from the *potestas* of the father by a single mancipation. For the law of the Twelve Tables speaks of three

FILIUM TER VENUDUIT, FILIUS A PATRE LIBER ESTO. *Eaque* res ita agitur. Mancipat pater filium alicui: is eum vindicta manumittit: eo facto revertitur in potestatem patris. Is eum iterum mancipat vel eidem vel alii; set in usu est eidem mancipari: isque eum postea similiter vindicta manumittit: quo facto rursus in potestatem patris sui revertitur. Tunc tertio pater eum mancipat vel eidem vel alii; set hoc in usu est, ut eidem mancipetur: eaque mancipatione desinit in potestate patris esse, etiamsi nondum manumissus sit, set adhuc in causa mancipii (c)

mancipations only in relation to the persons of sons, in these words: "If a father has exposed his son three times for sale, let the son be free from the father." Manumission is thus made; the father mancipates the son to some person who enfranchises him by the *vindicta*; when this is done, the son returns again under the *potestas* of his father; the father then mancipates his son again either to the same party or to another, but the custom is to mancipate him to the same person; this person enfranchises the son a second time by the *vindicta*, and the son is again brought under the *patria potestas*; the father then mancipates him a third time either to the same party or to another; the custom is to mancipate to the same person, and this last *mancipatio* dissolves the *patria potestas*; although the son is not yet emancipated, but is under *mancipium*. . . .

[In the MS. there is a lacuna of 24 lines.]

(b) *Emancipatione quoque desinunt liberi in potestatem parentum esse*. Emancipation was an act by which the *patria potestas* was dissolved in the life-time of the father; it was so named because it was originally in the form of a sale. Ulpianus says: "Liberi parentum potestate liberantur emancipatione, id est si posteaquam mancipati fuerint, manumissi sunt." Ulp. x. 1. This paternal bond could not be severed against the will of the son. Mr. Long says, quoting Nov. 89. c. 11, that "Justinian did not allow parents to emancipate a child against his will, though it seems that this might be done by the old law, and that the parent might so destroy all the son's rights of agnation." There seems to be no authority for this statement, but quite the reverse, for Paulus, one of the greatest authorities,

says, ii. 24: "Filius-familias emancipari invitus non cogitur." Emancipation was accomplished in the earlier times by means of mancipation, and manumission from the Mancipium. In later law, Emancipatio was effected "ex lege Anastasiana," upon petitioning for an imperial rescript, which must be preferred before the proper tribunal; or according to the appointment of Justinian, upon application to a magistrate. Its object was to terminate the patria potestas, which in later times, judging from the number of the emancipati, seems to have been deemed an inconvenient bond. "Pupillus est, qui quum impubes est, desiit in patris potestate esse aut morte, aut emancipatione." L. 239. pr. Dig. de verb. sig. (50. 16.)

In ancient times, as we learn from the laws of the XII Tables, there was no way for a son to break the bond at once. "Si pater filium ter venunduit, filius a patre liber esto." The son must be sold in mancipio, reduced to a quasi slavery *in servi loco*, and then manumitted. Upon his manumission he returned again to the potestas of his father. It was not till this was done a third time that the bond which bound the son to the father was severed. In the case of daughters and grand-children one sale was sufficient. "After the third sale the paternal power was extinguished, but the son was resold to the parent, who then manumitted him and so acquired the rights of the patron over his emancipated son, which would otherwise have belonged to the purchaser who gave him his final manumission." Before the reform of Justinian there were alternate forms of Emancipatio—the old forms just described, and that arising from the *lex Anastasiana*. Persons not present might be emancipated by the *lex Anastasiana*. To effect an Emancipatio there *must be unanimity* between the parties, as a son could not be thrust out of his family against his will. The emancipation being complete, there was a "*familiæ mutatio*," and the emancipatus was no longer a member of the agnatic circle. When the Anastasian emancipation was had recourse to, the "*jura legitima*" were preserved, but this reservation was excep-

tional, and the general rule was that there was a "*familiæ mutatio*." Unterholzner, quoted by Mr. Long, gives a clear and exact account of *emancipatio*. He says, "The *patria potestas* could not be dissolved immediately by *manumissio*, because the *patria potestas* must be viewed as an *imperium*, and not as a right of property, like the power of a master over his slave. Now it was a fundamental principle that the *patria potestas* was extinguished by exercising once or thrice, as the case might be, the right which the *paterfamilias* had of selling, or rather of pledging, his child. Conformably to this fundamental principle, the release of the child from the *patria potestas* was clothed with the form of a *mancipatio*, effected once or three times. The *patria potestas* was indeed thus dissolved, though the child was not yet free, but came into the condition of a *nexus*. Consequently a *manumission* was necessarily connected with the *mancipation*, in order that the proper object of the *mancipation* might be obtained. In all the cases in which the *manumission* was not followed by a return into the *patria potestas* it was attended with important consequences to the *manumissor*, and these consequences extended also to the *mancipating party*. Accordingly, it was necessary to provide that the decisive *manumission* should be made by the *emancipating party*; and for that reason a *remancipation*, which preceded the final *manumission*, was a part of the form of *emancipation*." Unterholzner *Zeitschrift*; *Diet. Gr. and Rom. Antiq. Art. "Emancipatio."*

In *Gai. Epit. i. 6. sec. 3.* we find the following remark on the *emancipation of a son*: "*Emancipatio autem, hoc est manus traditio, quædam similitudo venditionis est; quia in emancipationibus præter illum, hoc est certum patrem, alius pater adhibetur, qui fiduciarius nominatur. Ergo ipse naturalis pater filium suum fiduciario patri mancipat, hoc est manu tradit: a quo fiduciario patre naturalis pater unum aut duos nummos quasi in similitudinem pretii accipit, et iterum eum acceptis nummis fiduciario patri tradit. Hoc secundo et tertio fit, et tertio eum fiduciario patri mancipat et tradit et sic*

de patris potestate exit. Quæ tamen emancipatio solebat ante Præsidem fieri, modo ante curiam facienda est: ubi quinque testes cives Romani in præsentem erunt, et pro illo qui libripens adpellatur (id est stateram tenens) et qui antestatus adpellatur alii duo ut septem testium numerus ampleatur.

Tamen cum tertio mancipatus fuerit filius a patre naturali fiduciario patri, hoc agere debet naturalis pater, ut ei a fiduciario patre remancipetur, et a naturali patre manumittatur; ut, si filius ille mortuus fuerit, ei in hereditate naturalis pater, non fiduciarius, succedat. Feminae, vel nepotes masculi ex filio, una emancipatione de patris vel avi exeunt potestate et sui juris efficiuntur. Et hi ipsi quamlibet una mancipatione de patris vel avi exeant, nisi a patre fiduciario remancipati fuerint et a naturali patre manumissi, succedere eis naturalis pater non potest, sed fiduciarius a quo manumissi sunt. Nam si remancipatum eum sibi naturalis pater vel avus manumiserit, ipse eis in hereditate succedit. Quodsi habeat quis filium, et ex eo nepotes, et voluerit filium emancipare, et nepotes in sua potestate retinere, in arbitrio ejus est; aut si voluerit nepotes emancipare et filium suum in sua potestate retinere et hoc ei pro juris ordine licere manifestum est. Quod non solum de nepotibus, sed et de pronepotibus similiter facere potest."

(c) The gap at the close of this section has been thus filled in by Domenget, *Inst. Gaii* p. 74: "Igitur quum tertio mancipatus fuerit filius a patre naturali is hoc agere debet, ut filius ipsi remancipetur, deinde vero eum manumittere; quo fit, ut si filius mortuus fuerit, ei naturalis pater, non fiduciarius succedat; idem quoque dicemus de feminis et nepotibus masculis ex filio, quos una emancipatione de patris vel avi potestate exire superius exposuimus. Nam et his, nisi a fiduciario remancipati fuerint, et postea a patre naturali manumissi, non hic sed ille successurus esset." Therefore, when the son has been mancipated three times by his own father to the pater fiduciarius, the former ought to take care that his son is remancipated to him from his

fiduciary father, and after that, manumitted by his own father; so that if the son should die, his own father might succeed to him and not his *pater fiduciarius*. The same remarks may be made in regard to women and grandchildren of the male sex descended from sons, who by a single mancipation, as we have explained above, have been brought from under the potestas of their father or their grandfather. For also these, unless they have been remancipated by their fiduciary father and afterwards manumitted by their own father, will not be succeeded by the latter, but by their fiduciary father, by whom they have been emancipated.

The father was not compelled to emancipate his children except under the following circumstances: 1. If he had abandoned either his children or his grandchildren to prostitution. 2. If he had exposed his children. 3. If he had contracted an incestuous marriage. 4. If the child who had been adopted as an *impubes*, afterwards discovered that the adoption was prejudicial to him; l. 6. C. de spectaculis (11. 40.) Nov. 12. c. 2. “Et si pubes factus non expedire sibi in potestatem ejus redigi probaverit, æquum esse emancipari eum a patre adoptivo; atque ita pristinum jus recuperare, ll. 33. Dig. de adop. (1. 7.)

133. *Liberum autem arbitrium est ei qui filium et ex eo nepotem in potestate habebit, filium quidem potestate dimittere, nepotem vero in potestate retinere; vel ex diverso filium quidem in potestate retinere, nepotem vero manumittere; vel omnes sui juris efficere. Eadem et de pronepote dicta esse intellegemus. (d)*

133. He who has under his potestas a son and a grandson begotten by that son, has full power to dismiss his son from his potestas, but to retain his grandson: on the other hand, he may hold his son under his potestas, whilst he enfranchises his grandson or he may make both *sui juris*. We wish these remarks to be understood as applying also to great-grandchildren.

JUST. i. 12. 7.

(d) This section is obliterated in the MS. but is restored

to the text from the Digest. It is found l. 28. Dig. de adop. et emancip. (l. 7.) “a Goesch:” says Huschke, “recte h. l. posita. “Mihi tamen verisimilius visum est initium Just. Inst. fidelius quam in Dig. ex Gaio transumptum esse.”

134. *Præterea parentes liberos in adoptionem datos in potestate eos habere desinunt; et in filio quidem, si in adoptionem datur, tres emancipationes et duo intercedentes manumissiones proinde fiunt, ac fieri solent cum ita eum pater de potestate dimittit, ut sui juris efficiatur. Deinde aut patri remancipatur, et ab eo is qui adoptat vindicat apud Prætorem filium suum esse, et illo contra non vindicante, a Præatore vindicanti filius addicitur, aut jure mancipatur patri adoptivo vindicanti filium ab eo apud quem is in tertia mancipatione est: set sane commodius est patri remancipari. In ceteris vero liberorum personis, seu masculini seu feminini sexus, una scilicet mancipatio sufficit, et aut remancipantur parenti aut jure mancipantur. Eadem et in provinciis apud Præsidentem provinciæ solent fieri. (e)*

134. Moreover, parents cease to have under their *potestas* those of their children who have been given in adoption, and in the case of a son given in adoption, two intervening manumissions take place, in like manner as when the father dismisses him from the *potestas*, in order to make him *sui juris*. Then the son is either remancipated to the father, and claimed from him by the adoptor in the presence of the Prætor as his son; while the father not sustaining his claim, the son is adjudged by the Prætor to the claimant; or the son is mancipated according to law to the adoptive father upon his *vindicatio*, by the man under whose power he comes by a third mancipation, but it is more convenient to remancipate him to his father. For children other than sons, either of the male or female sex, a single mancipation suffices, and they are remancipated either to the natural father or are mancipated according to law. The same mode is observed in the provinces before the presidents of the provinces.

(e) See note on sec. 98. Pliny Epis. 8. 18. Gell. 5. 19. Suet. Oct. 64. Cic. de fin. 1. 7. Tertull. apol. 9.

“Veteres circuitus in adoptionibus, quæ per tres emancipationes et duas manumissiones in filiis, aut per unam emancipationem in ceteris liberis fieri solebant, corrigentes sive tollentes, censemus, licere parenti, qui liberos in potestate sua constitutos in adoptionem dare desiderat sine vetere observatione emancipationum et manumissionum. hoc ip-

sum actis intervenientibus apud competentem judicem manifestare, presente eo, qui adoptatur, et non contradicente, nec non eo, qui eum adoptat. l. ult. Cod. de adop. (8. 48.)

135. Qui ex filio semel iterumve mancipato conceptus est, licet post tertiam mancipationem patris sui nascatur, tamen in avi potestate est, et ideo ab eo et emancipari et in adoptionem dari potest. At is qui ex eo filio conceptus est qui in tertia mancipatione est, non nascitur in avi potestate. Set eum Labeo quidem existimat in ejusdem mancipio esse cujus et pater sit. Utimur autem hoc jure, ut quamdiu pater ejus in mancipio sit, pendeat jus ejus: et si quidem pater ejus ex mancipatione manumissus erit, cadit in ejus potestatem; si vero is, dum in mancipio sit, decesserit, sui juris fit: . . . ut supra diximus quod in filio faciunt tres mancipationes, hoc facit una mancipatio in nepote.

135. The child begotten by a son, who has been mancipated once or twice, although it may be born after the third mancipation of its father, is yet born under the *potestas* of its grandfather, and can therefore be emancipated by him and given in adoption; but a child begotten by a son who is undergoing the third mancipation, is not born under the *potestas* of his grandfather. Labeo thinks that the child will be born under the same *mancipium* as that of the father. We use this law, that so long as the father of the child is in *mancipium*, the right of the child is in suspense, and if the father be emancipated the child falls under his *potestas*; but if on the other hand, the father dies being still in *mancipium*, the child is born *sui juris*: . . . as we have said above, that three mancipationes operate in the case of a son, one suffices for a grandson. (f)

JUST. i. 11. 1.

(f) The patria potestas was not dissolved as we have seen in the case of the filius by the first and second mancipation. The child of a son conceived between the first and the third mancipation fell under the potestas of his grandfather. But if a child was conceived after the third mancipation, the patria potestas being then dissolved, the solution most favourable to the child was followed by the Sabinian School.

136. *Mulieres, quancis in manu sint nisi coemptionem fecerint, potestate parentis non liberantur.* Hoc

136. . . . The women who have come in *manus* are not liberated from the *potestas* of their father,

in Flaminica Diali senatus consulto confirmatur, quo ex auctoritate consulum Maximi et Tuberonis cavetur, ut hæc quod ad sacra tantum videatur in manu esse, quod vero ad cetera perinde habeatur, atque si in manum non convenisset. Sed mulieres quæ coemptionem fecerunt per emancipationem potestate parentis liberantur: nec interest, an in viri sui manu sint, an extranei; quamvis hæc solæ loco filiarum habeantur quæ in viri manu sunt. (h)

unless they have concluded a *Coemptio*. This is confirmed by a *senatus-consultum*, relating to the *Flaminica Dialis* (g) by which on the authority of Maximus and Tubero it was determined that the Flaminica is in *manus* with reference to the *Sacra* only, but beyond this, she is regarded just as if she had not come into *manus*. But women who have concluded a *Coemptio* become by *mancipatio* freed from the *potestas*; and it makes little difference whether they stand in the *manus* of their husbands or in that of a third party, although only those standing in the *manus* of their husbands, are considered as daughters.

(g) "Flaminica Dialis" is the distinctive appellation of the wife of the Flamen Dialis. She had various religious ceremonies to perform in conjunction with her husband. One special duty devolved upon her, viz., that of sacrificing a ram to Jupiter on each of the *nundinæ*. She could not be divorced; and when she died the Dialis could not marry again, but was compelled to resign his office. See Aul. Gell. x. sec. 15; Varro de L.L. vii. 44. Article "Flamen," Smith's Dict. Gr. and Rom. Antiq.

(h) Huschke restores this paragraph as follows: "Mulier eo, quod in manum convenit, nisi coemptionem fecerit, non utique de patris potestate exit; nam de flaminica Diali lege Asinia Antistia ex auctoritate Cornelii Maximi et Tuberonis cautum est, ut hæc quod ad sacra tantum videatur in manu esse, quod vero ad cetera perinde habeatur, atque si in manum non convenisset. Eæ vero mulieres quæ in manum conveniunt per coemptionem, potestate parentis liberantur; nec interest, an in viri sui manu sint an extranei, quamvis hæc solæ loco filiarum habeantur, quæ in viri manu sunt." Huschke gives the reason for his reading

as follows: "In restitutione maxime rationem habui Tacit. A. 4. 16. ad a. 24. ejus coss. fuerunt C. Asinius Pollio et C. Antistius Vetus."

137. . . . remancipatione desinunt in manu esse, et cum ex remancipatione manumissa fuerint, sui juris efficiuntur nihilo magis potest cogere, quam filia patrem. Set filia quidem nullo modo patrem potest cogere, etiamsi adoptiva sit: hæc autem virum repudio misso proinde compellere potest, atque si ei nunquam nupta fuisset. (i)

137. . . . by remancipation they cease to be in *manus* and become sui juris as soon as they are manumitted after remancipation (the wife who stands in the *manus* of her husband, and who wishes to be remancipated by him,) has, as little power to compel him thereto as the daughter the father. Nor can the daughter by any means compel her father, even if she is an adopted daughter, but the wife can compel her husband after repudiation by a bill of divorce (*repudio misso*) to dismiss her from *manus* as if she had never been married to him.

(i) Huschke asks the question, Could a woman compel her husband to remancipate her from the *manus*? Blume has been able to distinguish for certain in two lines only the letters composing the words "*vel ita*;" but after this the following is legible: "Nihilo magis potest cogere, quam filia patrem, etc." Huschke says that the reading *vel ita* is certainly wrong, and gives the following as his reading: "Si vero ipsa, quæ in manu viri sit, velit ab eo remancipari eum nihilo magis potest cogere, quam filia patrem." All the words to *velit* are doubtful. He thinks that Gaius opposes the woman to her father, who had stipulated for her remancipation from her husband. Goeschen says: "Gaius illud dicere videtur; mulierem maritum cum quo coemptionem fecerit non magis posse cogere ut eam jure suo dimittat, quam filia patrem," and in his latter edition of Gaius, Huschke reads: "ea vero, quæ cum viro suo coemptionem facit si velit ab eo, etc."

The *marital power* could be dissolved during the marriage;

and probably in the same manner and for the same causes as the *patria potestas*, because the woman, being *in manu*, was to her husband in the place of a child, *in loco filiæ*. Strictly, the woman being placed in the position of a daughter, could not compel her husband to emancipate her, but she could obtain the same result by means of repudiation. In the 133rd section we have seen that in certain cases the father was obliged to emancipate his children.

138. *Hi qui in causa mancipii sunt, quia servorum loco habentur, vindicta, censu, testamento manumissi sui juris fiunt. (j)*

138. Those who are placed under *mancipium*, being considered as slaves, become *sui juris*, when they are enfranchised by the *vindicta*, by the *census*, or by *testament*.

(j) A person could be freed from the *mancipium* in the same manner as a slave was liberated from the power of his master, *potestas dominica* with these modifications, that the *lex Ælia Sentia* was not applicable, and that the *mancipium* could be terminated by the *census*, even against the wish of those who exercised it, unless the person were given in *mancipio* by the pater "*ut sibi remancipatur*" or "*ex novali causa*." See ss. 17. et seq.; sec. 123. 140.; ii. 160. iii. 114.

139. *Nec tamen in hoc casu lex Ælia Sentia locum habet. Itaque nihil requirimus, cujus ætatis sit is qui manumittit, et qui manumittitur; ac ne illud quidem, an patronum creditoremve manumissor habeat. Ac ne numerus quidem legis Furie Caniniæ finitus in his personis locum habet. (k)*

139. However, the *lex Ælia Sentia* is not applicable to them. Consequently we do not enquire the age of the manumittor nor of the manumitted, nor further if the manumittor have a patron or a creditor. And the limit of number imposed by the *lex Furia Caninia* is not taken into consideration as regards these persons.

(k) Persons in *mancipium*, not being things, as mere slaves, could not be considered as pledged to the creditors of those who exercised the *potestas* over them. This is the

reason why neither the *lex Ælia Sentia*, nor the *lex Caninia* was considered as applicable to such persons. The *lex Ælia Sentia*, it will be remembered, amongst other provisions, made void the manumission of a slave intended as a fraud upon the creditors. The *lex Fusia Caninia*, passed previously to the *lex Ælia Sentia*, was intended also to prevent such fraud. The two laws stood in close connexion, as may be seen by secs. 46 and 47. Heineccius says, “Sub Augusto, rogante C. Caninio Cons. A.U.C., DCCLI. unde dicta etiam sit ea *lex Fusia Caninia*.” “Prius Augustus lege *Fusia Caninia*; posterius *Ælia Sentia* præstitit.” “Sæpe domini servos omnes manumittebant in fraudem creditorum:” Tac. Ann. xv. 55. “Sæpe servi a minoribus, quorum amores adjuverant, libertatem sibi loco mercedis stipulabantur. Cujus rei exempla multa in scenam producunt Terentius et Plautus.” Hein. Ins. Jur. Rom. i. l. 6. secs. 2. 3. Schulting Caii Inst. l. tit. ii. note 1.

140. Quin etiam invito quoque eo cujus in mancipio sunt census libertatem consequi possunt, excepto eo quem pater ea lege mancipio dedit, ut sibi remancipetur: nam quodammodo tunc pater potestatem propriam reservare sibi videtur eo ipso, quod mancipio recipit. Ac ne is quidem dicitur invito eo cujus in mancipio est census libertatem consequi, quem pater ex noxali causa (l) mancipio dedit, velut qui furti ejus nomine damnatus est, et eum mancipio actori dedit: nam hunc actor pro pecunia habet. (m)

140. Moreover, those who are submitted to the *mancipium* may be freed by means of the *census*, in spite of those in whose *mancipium* they stand, with the exception of the case where the father has given his son in *mancipium*, that he may be reconveyed to him. For the father seems then, in some sort, to reserve his own *potestas* in that very thing, that he receives his son in *mancipium*. Also, the son cannot attain freedom by means of the *census* in opposition to the will of him in whose *mancipium* he stands, when the father *ex noxali causa* has given him in *mancipium* to the party complaining; if for example, the father has been condemned for the theft of his son and has given him in *mancipium* to the complainant; for then the complainant has the son as a recompense.

(l) *Actio noxalis*. Noxal actions were established either by

the laws or by the edict of the Prætor. For theft, by the law of the Twelve Tables, for wrongful damage, by the *lex Aquilia*, and by the edict of the Prætor, for injuries and robbery with violence. Secs. 3 and 7. Inst. Just. de noxal. act. (iv. 8.)

(m) *Pecunia*. “Je traduirais volontiers le mot *pecunia*,” says Domenget, “par celui de *condamnation* et dirais : tient lieu de condamnation au demandeur.” Bechaus renders it : “Diesen hat nämlich der Kläger an Geldes Statt.” For the Actor or Plaintiff has him instead of money.

141. In summa admonendi sumus, adversus eos quos in mancipio habemus, nihil nobis contumeliose facere licere: alioquin injuriarum actione tenebimur. Ac ne diu quidem in eo jure detinentur homines, set plerumque hoc fit dicis gratia uno momento; nisi scilicet ex noxali causa mancipientur. (n)

141. In conclusion we must observe, that we dare not act injuriously against those whom we have in our *mancipium*, otherwise we become liable to an action for injury. And no one is held long under this legal position, but generally it occurs for the sake of form, only for a moment, unless indeed parties have been mancipated *ex noxali causa*.

(n) At the time of Gaius the children of those persons who were in mancipium, were reduced provisionally to the same condition as their natural father, if they had been conceived and born after he was in mancipium, and after his third mancipation. In the case of a child conceived after the third mancipation, his position was one of suspense. If he were born after the emancipation of his father, he fell under his potestas; if the father died in mancipium, the child was then born *sui juris*. In the time of Labeo the child appears to have remained in the potestas of the emancipator. See Gai. I. sec. 135.

142. Transeamus nunc ad aliam divisionem. Nam ex his personis, quæ neque in potestate neque in manu neque mancipio sunt, quædam

142. Let us now pass on to another division. For of those persons who are neither under the *potestas*, nor in *manus* nor in *mancipium*, some are

vel in tutela sunt vel in curatione, quædam neutro jure tenentur. Videamus igitur quæ in tutela vel in curatione sint; ita enim intelligemus ceteras personas quæ neutro jure tenentur. (o)

under a tutor, some are under a curator, some in neither of these legal conditions. Let us therefore notice those who are under a tutor, and those who are under a curator; for we shall thus ascertain who those persons are who are subject to neither.

JUST. I. 13. pr.

(o) Gaius now passes to another division of the "jus quod ad personas pertinet" which occupies the remainder of the first book. Hitherto he has discussed the following topics:

I. Omnes homines aut liberi sunt aut servi.

II. Quædam personæ sui juris sunt, quædam alieno juri subjectæ.

And now he comes to the concluding topic of the *jus personarum*;

III. Quædam personæ vel in tutela sunt vel in curatione, quædam neutro jure tenentur.

For Justinian's definition of liberty and slavery see Inst. lib. i. tit. iii. ss. 1, 2.

143. Ac prius dispiciamus de his quæ in tutela sunt. (p)

143. And first let us treat of persons under tutorship.

JUST. I. 13. pr.

(p) The Romans had no single expression by which to denote what we term "Guardianship," and what the Germans call "Vormundshaft." They employed two words, namely, *tutela* and *cura*. They had two kinds or species of guardianship, but no name to express the genus. It is singular that, rich as the Romans were in technical expressions, and possessing as they did a name for each of the species referred to, they had no term to denote the genus to which each belonged. The title in the Digest has for its rubric "De tutoribus et curatoribus." Dig. l. xxvi. tit. v. And in the Codex we very frequently find the terms

“tutor et curator” and “tutela et cura” combined. Guardianship may be defined as that authority over the person of a *homo sui juris* which the law provided for the purpose of his protection. “Tutela est vis ac potestas in capite libero ad tuendum eum, qui propter ætatem suam sponte se defendere nequit, jure civili data ac permissa.” Such is the famous definition of Servius, as quoted by Paulus, l. 1. pr. Dig. de tutelis (26. 1).

There were the following distinctions between the *patria potestas* and the *tutela*: the former was a jus possessed and exercised for the advantage of the pater-familias; the latter on the contrary was one to be used entirely in the interest of the pupillus or ward. A man under the potestas was a *homo alieni juris*, he possessed nothing that he could call his own, and had therefore nothing to lose. It was quite the reverse in the case of the tutela and the cura. A man did not cease to be a *homo sui juris* when he was placed under the protection of a tutor or a curator.

The fundamental idea is the same both in regard to the tutela and the cura. But the tutor was appointed for a person who had not a full personality, and the *auctoritas tutoris* was required to complement this defect in the persona of the ward, so that without its exercise there could be no full and complete personality. The curator had not this auctoritas, but his consent was required to render valid the acts of his ward. Thus it is said, “Tutor auctor fit; Curator consentiam tantummodo facit.”

The old Romans believed that it was only the man fit to bear a weapon of war that was a perfect man: and hence they placed children and women under the protection of tutors. This defect of age, and of strength arising from sex, gave rise to tutorship of two kinds:

I. The Tutela impuberum.

II. The Tutela muliebris.

To these may be added, as a distinct species of guardianship,
III. Curatio.

The Curator was given to persons who needed simply

assistance. The State appointed a person to act as curator for those persons who, from some cause or other, were unable properly to manage their own affairs. One important distinction in Roman Law on which stress should be laid is that between the *auctoritas tutoris* and the *consensus curatoris*. Curators were appointed under certain circumstances to *impuberes, puberes minores, furiosi, prodigi*, and, at their own request, to *invalid persons*. "Personale munus est tutela, cura adulti, furiosive, item prodigi, muti, etiam ventris, etc." L. 1. s. 4. Dig. de muneribus et. honor. (50 4.)

The *tutela impuberum*. Every impubes who was *sui juris* was entitled to receive a tutor in order to complete his legal *persona*. Such was the idea in the earliest period of the Roman State. Hence we find in the *Leges XII Tabularum* a fragment "De legitima agnatorum tutela." Again "*super pecunia tutelave suæ rei*." In which case Paulus says "Tutor separatim sine pecunia dari non potest," l. 53. Dig. de verb. sig. (50. 16.) Referring to these laws Gaius says, i. s. 155, "Quibus testamento quidem tutor datus non sit, iis ex lege XII agnati sunt tutores, qui vocantur legitimi. See also Just. l. 15. pr.

In the earliest period of the Roman Law there were two grounds upon which the tutela might be based—upon Testament, and upon Lex. The general maxim was "*Ubi successionis emolumentum, ibi et tutelæ onus esse debet*." Just. i. 17.

Again, Ulpianus says "Legitimi tutores sunt qui ex lege aliqua descendunt; per eminentiam autem legitimi dicuntur qui ex lege duodecim tabularum introducuntur, seu propalam quales sunt agnati, seu per consequentiam, quales sunt patroni." Ulp. Frag. xi. sec. 3. In the sixth century of the State there arose the delation of a Tutor by the authority of the magistrate.

The law of the Twelve Tables, to which special reference is so frequently made, is: "*Uti legassit super pecunia tutelave suæ rei, ita jus esto*." That is to say, "As any one has devised in regard to his property, or the tutela of his children,

so shall it be." Cicero, referring to this law, says "Pater-familias uti super familia pecuniaque sua legaverit, ita jus esto." De Invent. ii. 50. sec. 148.

This testamentary tutela had two peculiarities. First, the pater-familias alone could name a tutor in his will for his impubes child. Not the father simply as such. It was a prerogative belonging to the pater-familias and must be exercised by him in a regular testament, and not in a codicil, unless the codicil were confirmed and attested with testamentary solemnities. "Testamento quoque nominatim tutores dati confirmantur eadem lege duodecim tabularum his verbis *uti legassit super (familia) pecunia tutelave suæ rei, ita jus esto*; qui tutores dativi appellantur." Ulp. xi. s. 14. Then again the person appointed as testamentary tutor must have what is termed the testamenti factio passiva, i. e. he must be a fit person, not only in a moral sense, but he must possess due legal qualifications. "Testamento tutores dari possunt hi cum quibus *testamenti faciendi jus est*, præter Latinum Junianum; nam Latinus habet quidem testamenti factionem, sed tamen tutor dari non potest; id enim lex Junia prohibet." Ulp. xi. sec. 16.

The tutor thus appointed by will was named *in verbis conceptis*, that is, with select and solemn words. As for example, "Sempronius liberis meis tutor esto;" or as Gaius says, "Lucium Titium liberis meis tutorem do." Again: "Liberis meis vel uxori meæ Titius Tutor esto." Gai. i. s. 149. The wife might be permitted to exercise a certain choice; "Titiae uxori meæ tutoris optionem do;" or in a more limited sense, "Titiae uxori meæ tutoris optionem dumtaxat semel do, aut dumtaxat bis do." Gai. i. sec. 150, 152. Just as in the institution of an heir, or the bequest of a legacy, there must be a solemn or imperative form of words. This was testamentary tutorship in the purest form. In later times the prætor, after *causa cognitio*, allowed an imperfect testamentary tutor to be appointed. It was rather a nominatio than a datio, and the technical name for such a tutor was "tutor confirmandus."

When there was no testamentary tutor, and no tutor confirmandus, the *tutela legitima* came into operation. Of this, three kinds should be distinguished. The person for whom it might be necessary to appoint a tutor might be either an ingenuus, a libertus, or an emancipatus. When the person for whom a tutor was to be appointed was an "ingenuus non manumissus," then the law of the Twelve Tables provided that his proximate agnates should have the tutela. "Si intestato moritur cui suus heres nec escit, agnatus proximus familiam habeto." If there were no agnates to take the tutela legitima, it fell to the gentiles of his family, for "Si agnatus nec escit, gentiles familiam nancitor," said also the law of the Twelve Tables. Cicero, referring to both successions, says, "Si pater-familias intestato moritur, familia pecuniaque ejus agnatorum gentiliumque esto." De Invent. ii. 50. sec. 148. The jus gentilicium subsequently ceased, and in the time of the classical jurists the tutela legitima of an ingenuus could only be exercised by the agnates. Such was the law until Justinian published his Novella 118, in which he decreed that the cognates should be put in the place of the agnates. "Sancimus enim . . . neque ulla differentia neque hac in parte ex jure agnationis aut cognationis introducat, sed omnibus similiter ad tutelam vocentur, etc." Nov. 118. c. 5.

In the case of the *impubes libertus*, the *patronus* came in the place of the agnates, an appointment derived from the ancient law. Not that the patron was named *in verbis* in the laws of the Twelve Tables; but it was held upon interpretations to be the proper appointment, the jurists saying that such a succession was in accordance with the mind and spirit of the Decemviri. See Gaius l. 165. Ulp. xi. 3. The latter great jurist, in his book *xviii. ad Statulum*, says "Tutela legitima quam patronus de senatus consulto duodecim tabularum, non quidem expressis, sed conminatim delata est, sed per consequentibus hereditatibus que ex ipsa lege patronis datæ sunt." l. 3. pr. Dig. de

legit tutor. (26. 4.) When the *impubes libertus* belonged to the Latini Juniani, then by the lex Junia Norbana he was placed under the tutela of the person who had the nudum jus Quiritium. This person might be the manumissor or a third person. It was not necessarily the *manumissor*, but the *dominus*, whoever he might chance to be. Gai. l. s. 167. Ulp. xi. 19.

The third case to be mentioned is when the *impubes* is an *emancipatus*. It must be remembered that emancipation was only possible when the child was sold and mancipated; and further, that the mancipated son was regarded as *in servi loco*. With the purchaser, however, there was always a pacta fiducia binding him to manumit. It was made either de manumittendo or remanicipiendo. This manumissor was said to be *in patroni loco*; it was a kind of quasi-patron right that he possessed, which upon his decease survived to his agnates. This tutela was called in technical language the "tutela fiduciaria," and the manumissor was called the "tutor fiduciarius." The father himself might become in this way the *tutor legitimus*; in which case, after his death, the agnatic sons would exercise the same right as their father, not however, *qua pater*, but *qua manumissor*. In the time of Justinian there was no longer any *mancipatio* nor any emancipation, but Justinian ordained that, in every case when these forms might have been properly employed, it should be regarded as if the emancipation had actually taken place. There could no longer be the manumission of an extraneus, but the tutela of the father and the children of the father still remained, so that the father had the *tutela legitima* as parens manumissor and his agnate sons the *tutela fiduciaria*, not as brothers to the pupillus, but as agnates to the father. It is said that a change was made in the law by the Novella cited, and that the tutela in this case also passed to the cognates. It is quite true, as we have seen, that the next cognate obtained the tutela of an *impubes ingenuus*; but it is to be observed that a *lex generalis posterior* does not annul or repeal a *lex specialis prior*. The

118th Novella gave the cognates the tutela in the place of the agnates; but when, as in this case, the tutela was special, we may safely affirm that it was not affected by the passing of that imperial enactment.

When in ancient times there could be no *tutela testamentaria* nor *legitima*, there was no help for the *impubes*, and he was handed over to the *propinqui* who had no legal power to protect his person or to guard his interests. This gave rise to the passing of the law known as the *lex Atilia*. This law empowered the Prætor urbanus and the major part of the Tribunes of the Plebs to appoint a guardian in the city of Rome. A tutor under similar circumstances was permitted to be appointed in the Provinces by the Præsides under the provisions of the law known as the *lex Julia et Titia*. When the *lex Atilia* was passed we have no certain mode of determining. In the year 1640 there was found in Calabria a bronze table which is now preserved in Vienna. It contains the *senatus-consultum* "*de bacchanalibus*," passed A. U. C. 568. From the contents of this relic of antiquity we know that the law had then been passed. Livy also refers to this law, and he is the only classical writer who does so. In his thirty-ninth book, (c. 9.) *Hisपाला Fecinia* is said "*post patroni mortem, quia in nullius manu esset, tutorem a tribunis et Prætore petiisse*." See Hein. p. 168. s. 10. Puchta vol. 1. p. 301. note t. Spangenberg monum. legalia p. 5. 7.

Ulpianus refers to this law in the following words; "*Lex Atilia jubet mulieribus pupillisve non habentibus tutores dari a prætore et majore parte tribunorum plebis, quos tutores Atilianos appellamus. Sed quia lex Atilia Romæ tantum locum habet, lege Julia et Titia prospectum est, ut in provinciis quoque similiter a præsidibus earum dentur tutores*." Tit. xi. s. 18. Gai. i. 185, 186, 187. pr. sec. 1. 2. Just. de Atil. tut. (1. 20.) Theophilus 1. 20. Cic. in Ver. ii. 156. Gai. i. 57. Just. 1. 15. pr. s. 2. 1. 1. pr., l. 5. pr. Dig. de legit. tut. (26. 4.) Nov. 118. For remarks on the Tutela muliebris, see p. 153.

144. Permissum est itaque parentibus liberis quos in potestate sua habent testamento tutores dare; masculini quidem sexus impuberibus duntaxat, feminini vero sexus impuberibus quibus et liberis. Veteres enim voluerunt feminas, etiamsi perfectæ ætatis sint, propter animi levitatem in tutela esse. (q)

144. Parents may give tutors by testament, to such of their children as are under their *potestas*, to children of the male sex being minors, to those of the female sex not only as minors but after they have attained their majority; for our ancestors have determined that women, even when they have attained their majority, should, from their want of firmness of character, be placed under tutors.

JUST. I. 13. 3.

(q) *Masculini quidem sexus impuberibus veteres enim voluerunt feminas, etc.* In the small gap stands, as Huschke thinks, '*quocant*' *pup.* -- qui vocantur pupilli, with which, at least, agree the only really legible marks of the original MS. After the word *impuberibus*, an entire line is wanting, viz: *feminini vero sexus tam puberibus quam impuberibus*. What Gains subsequently says confirms this reading, (see. i. 168. 184) for he often speaks of the pupilli in referring to women, and therefore, according to his custom, he was likely to have explained this subject in a previous place.

145. Itaque si quis filio filiaque testamento tutorem dederit, et ambo ad pubertatem pervenerint, filius quidem desinit habere tutorem, filia vero nihilominus in tutela permanet: tantum enim ex lege Julia et Papia Poppæa jure liberorum a tutela liberantur feminae. Loquimur autem exceptis Virginibus Vestalibus quas etiam veteres in honorem sacerdotii liberas esse voluerunt: itaque etiam lege XII tabularum cautum est.

145. Therefore if a tutor has been given by will to a son and daughter, and they have both attained their majority, the son indeed ceases to be under the tutor, but the daughter nevertheless remains under tutelage; for women are liberated from tutelage only by the *jus liberorum*, according to the *lex Julia et Papia Poppæa*. We except from these remarks the vestal virgins, whom the ancients, in honour of their priestly office, willed to be free; and this is also provided by the law of the Twelve Tables.

146. *Nepotibus autem nepotibusque ita demum possumus testamento tutores dare, si post mortem nostram in patris sui potestatem jure recasuri non sint. (r) Itaque si filius meus mortis meæ tempore in potestate mea sit nepotes quos ex eo habeo non poterint ex testamento meo habere tutorem, quamvis in potestate mea fuerint: scilicet quia mortuo me in patris sui potestate futuri sunt.*

146. We can also give tutors by testament to grandsons and granddaughters, when after our death they do not legally fall under the *potestas* of their father. Therefore if my son is in my *potestas* at the time of my death, my grandchildren by that son cannot have a tutor appointed them by my will, although they were under my *potestas*, because at my decease, they will be under the *potestas* of their father.

JUR. I. 13. 3.

(*r*) *Si post mortem nostram in patris sui potestatem jure recasuri non sint.* Here *jure* has arisen, without doubt, from the doubling of the three strokes of the preceding *m* and the following *re* (casuri), and is therefore to be expunged. It is not in the Institutes, nor was it ever thus employed by the Roman jurists. Huschke Kritik, in loco.

147. *Cum tamen in compluribus aliis causis postumi pro jam natis habeantur, et in hac causa placuit non minus postumis, quam jam natis testamento tutores dari posse: si modo in ea causa sint, ut si vivis nobis nascantur, in potestate nostra fiant. Hos etiam heredes instituere possumus, cum extraneos postumos heredes instituere permissum non sit. (s)*

147. Posthumous children, as in many other cases, are considered as already born before the death of their fathers, and tutors may be given by testament to posthumous children, as well as to children already born, provided that the posthumous children would come under our *potestas*, if they had been born in our life time. We may also institute them as heirs, though it is not permitted us to institute as heirs posthumous children of another family.

JUR. I. 13. 4.

(*s*) We learn also from Gai. ii. 130, that posthumous children may be either instituted as heirs or disinherited. Posthumous children who, if they had been born before the death of their father, would have been under his *potestas*.

were, in contemplation of law, considered as having been born at the moment of their father's decease, when such a conclusion would be for their advantage.

148. *Uxori* quæ in manu est proinde ac si filiæ, item *nurui* quæ in filii manu est proinde ac nepti tutor dari potest.

148. A tutor can be given to a wife who is in *manus* in the same manner as to a daughter, also to a daughter-in-law who is in the *manus* of your son, just as to a grand-daughter.

149. Rectissime autem tutor sic dari potest: LUCIUM TITIUM LIBERIS MEIS TUTOREM DO. Sed et si ita scriptum sit: LIBERIS MEIS VEL UXORI MEÆ TITIUS TUTOR ESTO, recte datus intellegitur. (t)

149. A tutor can be legally appointed in the following terms: "I give as a tutor to my children Lucius Titius" (*Lucium Titium Liberis meis Tutorem do, lego, aut do.*) Moreover, if it be thus written, "To my children, or to my wife, Titius shall be tutor," it is considered as legally expressed.

(t) Goeschen, on this section, observes that in the MS. in the place of *Do* we find *sed do lg. aut do*. Hence, we may read "Do lego aut Do." Compare subsequently i. 152, aut DUMTAXAT BIS DO. *Lig.* instead of *Leg.* is a common error in the Veronese MS. Upon this point compare ii. 193, where Gaius, also in matters of bequest, represents *Do Lego* as the normal form of the "legatum per vindicationem," and observes that one might say simply either *Do* or *Lego*. The latter was not customary with the *tutoris datio*, in which case it was usual to say *Do*, whilst in the former case *Lego* was employed. Gaius (ii. 289.) also cites as equally admissible the objective formula *Do*, which in the passage cited is equivalent to the imperative *Esto*.

150. In persona tamen uxoris quæ in manu est recepta est etiam tutoris optio, id est, ut liceat ei permittere quem velit ipsa tutorem sibi optare, hoc modo: TITIÆ UXORI MEÆ TUTORIS

150. Yet as regards the person of a wife who is in *manus*, the choice of a tutor is permitted her; that is, the husband may permit her to choose as a tutor for herself some one whom

OPTIONEM DO. Quo casu licet uxori eligere tutorem vel in omnes res vel in unam forte aut duas.

she wishes, adopting the following formula—"I give to my wife Titia the choice of a tutor." In this case the wife can choose a tutor either for all her affairs, or possibly only for one or two of them.

151. Ceterum aut plena optio datur aut angusta.

151. Moreover the choice is either unlimited (*plena*) or restricted (*angusta*).

152. Plena ita dari solet ut proxime supra diximus. Angusta ita dari solet: TITIA UXORI MEÆ DUMTAXAT TUTORIS OPTIONEM SEMEL DO, aut DUMTAXAT BIS DO.

152. The unlimited choice is generally granted in the form we have indicated above; but the limited is usually thus given—"I give to my wife Titia for once the choice of a tutor," or, "I give it her for twice only."

153. Quæ optiones plurimum inter se differunt. Nam quæ plenam optionem habet potest semel et bis et ter et sæpius tutorem optare. Quæ vero angustam habet optionem, si dumtaxat semel data est optio, amplius quam semel optare non potest: si tantum bis, amplius quam bis optandi facultatem non habet. (*u*)

153. These two kinds of choice differ very much the one from the other; for the woman who has unlimited choice, can choose a tutor two or three times, and even oftener; but as to the woman who has a limited choice, if only a single choice is given, she cannot exercise it more than once: if she is limited to two acts of choice, she has not the right of choice more than twice.

(*u*) *Tutela muliebris.* In commenting upon this subject it may be observed, in the first place, that from the earliest period of Rome women were as filiæ-familias placed under the potestas of the father; or as matres-familias, when the marriage was accompanied by the coemptio, were subjected to the manus of their husbands. If, however, a woman were neither under the potestas of her father nor in the manus of her husband, the universal rule was that "propter animi levitatem," (Gai. i. s. 144.) she was placed under the auctori-

tas of a tutor. This *auctoritas* exercised by the tutor will help to explain what is to be understood by the *tutela muliebris*.

The vestal virgins were exempted from this tutelage. Plutarch says that in compensation for the severe conditions imposed upon them during the period of thirty years, to which their vows extended, they had granted to them, as special privileges, the power to make a testament during the life-time of their father, and the free administration of their own affairs *without a guardian or tutor*. Plutarch Vit. Num. cap. 10. Gai. i. 145. Again, by the lex Papia Poppæa there was an institution known as the *justrium liberorum*, which provided that if a Roman woman had borne three children, and if a *liberta* had borne four living children, she was considered as no longer having need of a tutor. “Lex Papia Poppæa postea libertas *quattuor* liberorum jure tutela patronorum liberavit.” “Item ingenuæ trium liberorum jure honoratæ eadem lex id jus dedit quod ipsi patrono tribuit.” Ulp. Frag. xxix. ss. 3. 7.

The *tutela testamentaria* was greatly extended in the case of women, so that not only was the father permitted to name a tutor for his daughter, but the husband also had the right to appoint one by will for his wife, to act in the event of her being left a widow. An extension of the *tutela testamentaria* was made, as we learn from the text, for the husband could give his wife the *tutoris optio* after his decease enabling her to choose a tutor once or more for herself. This *optio* might be *plena* or *angusta*. When she had the *plena tutoris optio* it enabled her, if the tutor she had chosen chanced to die, to select another, and so on successively during the entire course of her life. The *tutela angusta* enabled the wife to make a single choice, or to choose twice, or thrice, according to the strict terms of the appointment. The husband said, “My wife after my death shall choose a tutor once, twice, or thrice,”—as the case might be. After she had exhausted her right of choice, a *tutor legitimus* must be appointed. When there was no *tutor testamentarius*

the *tutela legitima* took effect, in accordance with the law of the XII Tables. "At si intestato moritur, cui suus heres nec escit, adgnatus proximus familiam habeto." If there were no proximus adgnatus to take the tutorship, it devolved upon the patronus and his children: "libertorum et libertarum tutela ad patronos liberosque eorum pertinet. Quæ et ipsa tutela legitima vocatur." Inst. de leg. pat. tut. (1. 17) Gai. i. 165. In the case of emancipated children, the father became the tutor legitimus. "Si quis filium aut filiam impuberem emancipaverit, legitimus eorum tutor erit." Instit. de leg. parent. tut. (1. 18). It was, however, only the father that was the tutor; if the children succeeded to his tutela, or if an extraneus manumissor obtained the tutela, it was said to be a *tutela fiduciaria*. "Qui liberum caput mancipatum sibi vel a parente vel a coemptionatore manumisit, per similitudinem patroni tutor efficitur, qui fiduciarus tutor appellatur." Ulp. Frag. xi. s. 5.

The "tutor legitimus muliebris," and also the "patronus libertæ tutor," could, by a *cessio in jure*, transfer the tutorship to another, who was in this case called the *cessicius tutor*; but this *tutela cessicia* was extinguished by the death or the capitis deminutio of the person ceding it, or reverted to him if the cessicius tutor died or on his part suffered a capitis deminutio.

The lex Claudia altered all this. Before the discovery of Gaius, a passage relating to the lex Claudia was found in Ulpianus, which was unfortunately defective. It ran as follows: "Quantum ad agnatos pertinet, hodie cessicia tutela non procedit, quoniam permissum erat in jure cedere tutela feminarum tantum, non etiam masculorum; feminarum autem legitimas tutelas lex Claudia sust"—(here the termination of the word was lost) "excepta tutela patronum." Ulp. xi. 8. There was for many years a controversy among jurists as to the completion of the word sust; some contended that it should be read *sustinet*, and others, among whom was Cujacius, contended for the reading *sustulit*. The discovery of Gaius has decided this controversy, and

shown that the opinion of Cujacius was the correct one. When there was no tutor testamentarius nor legitimus then, as already observed, the *lex Atilia* and the *lex Julia et Titia* came into operation, and secured for the woman the benefit of the *tutela dativa*, as it was termed.

Both Livy and Cicero refer to the ancient order of things which strictly guarded the person and the property of women, and regret the effort made to thrust them into the turmoil of public life.

"Equidem," said M. Porcius Cato when consul, "non sine rubore quodam paullo ante per medium agmen mulierum in forum perveni. . . . Majores nostri nullam ne privatam quidem, rem agere feminas sine auctore, voluerunt; in manu esse parentum, fratrum, virorum. Nos (si Diis placet) jam etiam rempublicam capessere eas patimur, et foro prope, et concionibus, et comitiis immisceri." Liv. lib. 34, c. 2.

In regard to the duty of the tutor appointed for the protection of a woman, it was much more simple than in the case of a man. The tutor had no right to the woman's property, nor right of government over her, nor had he any *negotiorum gestio*, but simply the right to interpose his *auctoritas*. Hence Ulpianus says, "*Mulierum autem tutores auctoritatem dumtaxat interponunt.*" Ulp. Frag. xi. 25. The cases in which this interposition of authority was needed are clearly stated by Ulpianus. "*Tutoris auctoritas necessaria est mulieribus quidem in his rebus, si lege aut legitimo judicio agant, si se obligent, si civile negotium gerant, si libertæ suæ permittant in contubernio alieni servi morari, si rem Mancipi alienent.*" Ulp. xi. sec. 27.

Thus if the woman were entangled in a law suit, whether as plaintiff or defendant; if the woman were engaged in a transaction that involved a legal obligation; if she made a transfer *in jure cessio*; or were party to an *acceptilatio* which was a solemn form of promise—as "*Titius quod ego tibi promisi, habesne acceptum? et Titius respondet: habeo.*" l. 6. Dig. (46. 4.)—if also it became necessary to constitute

a *dos* :—she must secure in these and similar cases the interposition of the *auctoritas tutoris*. See Cic. pro Flacco 34., where however the *res mancipi* are not mentioned.

In speaking of the *tutela muliebris*, we must distinguish carefully between two classes of tutors. In one, the *tutela* was regarded as existing as much for the benefit of the tutors as for that of the ward. In the second class it was held to be exclusively for the benefit of the person under the *tutela*. If the *tutela* were exercised either by the *proximus adgnatus*, or the *patronus*, or the *parens manumissor*, these persons could not be compelled by legal process to interpose their *auctoritas*. The *tutela* was a personal *jus*, and the tutor might interpose at any time to prevent the spendthrift woman from wasting her means. The close connexion subsisting between the agnates of the woman and herself as a member of the same *familia*, and also the bond of common interest which united her to the *patronus* and to the *parens manumissor*, gave to these persons, when they became her tutors, not merely a legal, but a personal and pecuniary interest in her property. Hence the law gave to these tutors latitude of judgment, and allowed them either to withhold or to interpose their *auctoritas* in the way they might deem most beneficial for their own family interests, as well as for the interests of the woman herself. When the tutors had no personal interest—as was the case with the *tutores testamentarii*, the tutors whom the woman had the option of appointing herself, the *tutores dativi*, and the *tutores fiduciarii*;—they could not refuse under certain circumstances, to exercise their *auctoritas* as the woman might wish. They might reason with her and endeavour to dissuade her from requiring them to exercise their *auctoritas*; but as it was her right she could if needful compel them to act. This distinction in the two classes of tutors was so great that it deserves to be carefully noted. Cicero even goes so far as to say, that the tutors were in the *potestas* of the woman; by which he probably only means, that the Roman women of his time were quite aware of the power that the law gave

them, and were not at all indisposed to demand its exercise. "Mulieres omnes, propter infirmitatem consilii, majores in tutorem potestate esse voluerunt: hi invenerunt genera tutorum, quæ potestate mulierum continerentur," Orat. pro Murena, c. 12.

Those tutors who had a *jus tutorem* were not legally disqualified either by insanity or by minority. Such was the case when the tutorship fell to a proximus agnatus, or a patronus, or to a parens manumissor. In those instances in which, from physical causes, there was a temporary disqualification, a tutor *ad hoc* was usually appointed. To quote an example, "Præterea etiam in locum muti furiosive tutoris alterum dandum esse tutorem ad dotem constituendam senatus censuit." Ulp. tit. xi. 21. See also Ulp. tit. xi 20, 22—24.

When such disqualifications occurred in the second group of tutors, their effect was at once to put an end to the tutorship. It was only when there was a personal right in the tutor entitled to protection, that the circumstances we have mentioned as a disqualification did not produce that effect. It was the proximate agnate, the patron, and the parens manumissor who had the right of tutorship and the power to convey this right to another in *jure cessio*, or to appoint a *tutor cessicius*. The effect of the lex Claudia was that a free-born woman was no longer placed under a real but only under a formal tutela. Very soon after the time of the classical jurists the *tutela muliebris* entirely ceased. The last trace of it appeared in the time of Diocletian. "Divi Diocletianus et Constantius Aureliæ Pantiae. Aetor rei forum sequi debet, et mulier quoque facere procuratorem sine tutoris auctoritate non prohibetur." Vat. Frag. 325. It is not easy to determine the date, at which this *tutela* ceased, but it was probably between the time of Diocletian and Valentinian. We find no trace of the institution in the Codex Gregorianus, nor in the Codex Hermogenianus, nor in the Codex Theodosianus, nor in the legislation of Justinian. Ulp. xi.

6, 7, 8, 17, 20 and 22, xix. 11. Gai. i. 170—181. Puchta Instit. ii. 156. iii. 297, 302. Frag. Dos. sec. 17. Cic. pro. Flac. 34. Vat. Frag. 45. 1. Scheurl Instit. 164. Rudorf das Rechts der Vormundschaft, passim. Le Fort. essai historique de la tutelle, en Droit Romain; Geneve. 1850.

154. Vocantur autem hi qui nominatum testamento tutores dantur, dativi; qui ex optione sumuntur, optivi.

154. Those tutors who are given by testament are called *dativi*; those taken in consequence of the right of choice *optivi*.

155. Quibus testamento quidem tutor datus non sit, iis ex lege XII agnati sunt tutores, qui vocantur legitimi.

155. They to whom no tutor has been given by testament, have, by the law of the Twelve Tables their *agnati* as tutors; these tutors are called *legitimi*.

156. Sunt autem agnati per virilis sexus personas cognatione juncti, quasi a patre cognati: veluti frater eodem patre natus, fratris filius neposve ex eo, item patruus et patruus filius et nepos ex eo. (v) At hi qui per feminini sexus personas cognatione junguntur non sunt agnati, sed alias naturali jure cognati. Itaque inter avunculum et sororis filium non agnatio est, sed cognatio. Item amitæ, materteræ filius non est mihi agnatus set cognatus, et invicem scilicet ego illi eodem jure conjungor; quia qui nascuntur patris, non matris familiam sequuntur.

156. *Agnati* are those who are related to each other as kinsmen, through males, or related on the father's side, like a brother by the same father, a brother's son, or a son of such a son, also an uncle on the father's side, and his son and grandson. But those who are related to us through females are not *agnati*, but merely *cognati* by their natural relationship. Thus there exists no agnation between the mother's brother (avunculus) and the sister's son, but merely cognation; again, the son of the sister of my father, or of the sister of my mother, is not related to me by agnation, but by cognation, and in the same way, I am his cognate, as children follow in the family of their father, and not that of their mother.

(v) *Sunt autem agnati per virilis sexus personas, etc.*
This definition of agnation almost follows the well-known

and more frequently cited one of Ulpianus, who says: "*Ag-nati sunt a patre cognati virilis sexus, per virilem sexum des-cendentes, ejusdem familiæ, velut patrui, fratres patruels.*" Ulp. xi. 4. The term agnation is employed to express legal rather than natural relationship; yet it often happens that agnates and cognates are consanguine relatives, though this is by no means always the case, as persons are brought into the agnate relationship by marriage, adoption, &c. Paulus says: "*Inter agnatos igitur et cognatos hoc interest, quod inter genus et speciem. Nam qui est agnatus et cog-natus est, non utique autem qui cognatus est et ag-natus est. Alterum enim civile, alterum naturale nomen est.*" l. 10. sec. 4. Dig. de gradibus (38. 10.) All who were agnates were either under a common *potestas*, having the same pater familias, or they would have been under their common father if he had been still living. Of a woman, as already observed, it is said: "*Mulier autem familiæ suæ et caput et finis est.*" l. 195. sec. 5. Dig. de verb. sig. (50. 16.) The peculiar use of the word *caput* is worth notice. It is used as almost synonymous with *finis*. The loss of the entire *caput* was the same thing as the loss of the life. The same meaning of the word appears in the phrase "*capitis deminutio*," and in our expression, "*capital punishment.*" The woman was the *caput et finis* of the family, because upon her marriage she suffered a *capitis deminutio*, losing her own *familia*, and passing under a new *potestas*. She was the last link in the agnatic chain of her natural family. From what has been said it will be seen that, in speaking of agnation, we ought to distinguish between natural agnation and that which arises from some legal act or deed. The natural agnates in the concise and exact words of Ulpianus are those "*per virilem sexum descendentes.*"

There are *three* elements necessary to constitute natural agnation between persons. They must be: 1. *Cognati a patre.* 2. *Descendentes per virilem sexum.* 3. *Ejusdem familiæ.* Applying these tests, it follows that the mother and all her natural relations are only cognates to her

children; and every Roman was related by agnation to his son and his father's agnatic relations: not to his father's cognates. Nor was he agnatically related to *all* the relatives of his paternal grandfather, for all the grandfather's maternal relatives must be excluded from the agnatic relationship, which was traced only through males. In accordance with *Femina semper est finis et caput familiæ*, the children of a woman can never enter the agnatic circle of the mother, for in a proper marriage they are in that of the father. If they have no father they become, so to speak, *Principes* of a new agnatic circle, and build up a new familia.

Ulpianus introduces the expression *ejusdem familiæ* with the utmost propriety; for as soon as the child suffers a *capitis deminutio*—as soon, for instance, as the father *emancipates* his child, or when there is a *datio in adoptionem*—the agnatic bond is broken and the child passes into a new familia. It will thus be seen how narrow agnation is as compared with cognation.

But, again, agnation may include those who are not merely natural relatives. Thus, when a man is adopted, he becomes the agnate relative of all who are under the *potestas* of the *pater adoptans*. The adopted son is as much an agnate as if he were the lawfully begotten child of the pater adoptans; but he stands in no relation at all to the cognates of the father. He is an agnate brother to the daughter of the pater adoptans; but when the father emancipates this daughter, the relationship at once ceases. So long as they were relatives by agnation, the adopted brother could not marry her, but if she were emancipated he could. In the time of the classical law, agnation might be based upon *coemptio in manum*; but in the later Roman law this ceased, and the only way in which agnation could be engendered, when it did not arise by natural relationship, was by adoption.

If we then seek a single expression to take in all that we are to comprehend as implied in agnation, we should say, that by agnates we are to understand all those who are united by the bond of the same *potestas*, or who are in *jus*, as a

wife in manus, or who are in the manus of a son under the potestas, or who would be thus united if the pater-familias had not been removed. This gives the deeper meaning of this legal relation, which, though peculiar to the Romans, was probably derived from much earlier oriental sources. On the death of the pater-familias, the patria potestas was dissolved, and the sons became respectively heads of families. But all these persons continued to be members of the same familia, that is, they were still agnati, and consequently the agnation subsisted among persons so long as they could trace back their descent through males to one pater-familias.

Dr. Maine correctly observes: "The foundation of agnation is not the marriage of father and mother, but the authority of the father. All persons are agnatically connected together who are under the same paternal power, or who have been under it, or who might have been under it if their lineal ancestor had lived long enough to exercise his empire. . . . Where the potestas begins, kinship begins; and therefore adoptive relatives are among the kindred. Where the potestas ends, kinship ends; so that a son emancipated by his father loses all rights of agnation." See l. 7. 23. Dig. de adopt. et emancip. (1. 7); l. 4. Dig. unde cognati (38. 8). Marezoll. Inst. p. 189. Scheurl. Instit. p. 76 et seq. Mr. Long's Art. "Cognati," in Dict. Gr. and Rom. Antiq. Maine's Anc. Law, p. 149.

157. Sed olim quidem, quantum ad legem XII tabularum attinet, etiam feminae agnatos habebant tutores. Set postea lex Claudia lata est quæ, quod ad feminas attinet, tutelas illas sustulit. Itaque masculus quidem impubes fratrem puberem aut patrum habet tutorem; feminae vero talem habere tutorem non *intelliguntur*.

157. Formerly, as far as relates to the law of the Twelve Tables, women also had their agnates for tutors, but afterwards the *lex Claudia* was promulged, which repealed this kind of tutelage in regard to women. Thus males who are minors have for tutor either their brother who is of full age, or their paternal uncle (patruus), but women, on the other hand, can have no such person for a tutor.

158. Set agnationis quidem jus capitis diminutione perimitur, cognitionis vero jus non commutatur: quia civilis ratio civilia quidem jura corrumpere potest, naturalia vero non potest.

158. The legal bond of agnation is indeed destroyed by *capitis deminutio*; but the bond of cognition is not so changed; for although civil polity may annul civil rights, it cannot destroy natural rights.

JUR. I. 15. 3.

159. Est autem capitis diminutio prioris *capitis* permutatio eaque tribus modis accidit: (w) nam aut maxima est capitis diminutio, aut minor quam quidam mediam vocant, aut minima.

159. The *capitis deminutio* is a change of one's former *status*, and it happens in three ways; for it is either the (*maxima*) greatest *capitis deminutio*, or the (*minor*) lesser which some call (*media*) intermediate, or (*minima*) the least.

JUR. I. 16. pr.

(w) *Est autem capitis deminutio prioris status permutatio.* To understand this peculiar institution of Roman jurisprudence, (*capitis deminutio*) it is necessary to note:—That a person (*persona*) is not identical, and must not be confounded, with man simply considered as a physical being. A person is one who can be the subject of legal rights and obligations. There may be in Roman law persons who are not men, and on the other hand, men who are not persons; but there can be no *persona* without the *status libertatis*. Slaves are *homines*, but they are nothing more. They are not *personæ*. There are *personæ* which are not men; corporate bodies for instance, such as *municipii* which are *personæ* and may possess property. But a *municipium* is something quite different from the separate citizens of which it is composed. So also *pia corpora* are persons, though they have no physical objective existence. *Personæ* again may be either physical or juridical—which were formerly called moral. When the *persona* is attached to a physical man, it is said that there is a physical person; when, by statute or by operation of law, it attaches to something different from a man, such a person is said to be a juridical person. Of such *personæ*,

there are *municipii*, *pia corpora*, the *hereditas jacens*, the *fiscus*, and many others. This distinction between *homo* and *persona* must be borne in mind.

In speaking of the *capitis deminutio* we have to consider the physical person. To be such a physical man as the law recognised, three qualifications were needed. 1. There must be a perfect birth; 2. There must be life after birth; 3. There must be the human form. Strictly speaking, until a child has gazed upon the light of the world, there exists no man, and consequently no physical persona. This rule has no exception. "*Qui mortui nascuntur, neque nati neque procreati videntur, quia nunquam liberi appellari potuerunt.* l. 129. Dig. de verb. sig. (50. 16.) What Paulus says in another passage has been supposed by some critics to contradict what we have just stated. It does so however only in appearance. "*Qui in utero est, perinde, ac si in rebus humanis esset custoditur quoties de commodis ipsius partus quæritur; quamquam alii, antequam nascatur, nequaquam prosit.* l. 7. Dig. de stat. hom. (1. 5.)

What Paulus means is not that the child has rights whilst it is in the mother's womb, but that when it is actually born its legal life may be dated back to the earliest period of its physical existence.

There are three conditions in which after birth the physical man may be found. He may be either in the *status libertatis*; the *status civitatis*; or the *status familiæ*. There were two things necessary to constitute a physical person, the *status libertatis* and the *status civitatis*. The man must be a *civis* to have a civil personality. It was not enough that he be free. He must own himself in Quiritarian ownership in order to be a persona in the eye of the Roman law. When a man was free but not a *civis Romanus*, he was entitled to every benefit to be derived from the *jus gentium*, but he had no right to the privileges arising from the *jus civile*. As there are two absolute requirements for the physical persona, so there are two grounds for its extinction; these are either death or the *capitis deminutio*. At death

however, the physical man only expires; the legal persona continues to exist, either in the hereditas jacens, or in the heir who succeeds in universal jus. Death, however, as already observed, was not the only way in which the physical persona was extinguished. It ceased by the destruction of the status civilis; and this might be effected in a threefold way. “Capitis deminutionis tria genera sunt, maxima, media, minima. Tria enim sunt, quæ habemus, libertatem, civitatem, familiam. Igitur, cum omnia hæc amittimus, hoc est libertatem, civitatem, familiam, maximam esse capitis deminutionem; cum vero amittimus civitatem, libertatem retinemus, mediam esse capitis deminutionem; cum et libertas et civitas retinentur, familia tantum mutatur, minimam esse capitis deminutionem constat.” Such is the definition of Paulus in l. 11. Dig. de capite min. (4. 5.)

The “capitis maxima deminutio” took place when a Roman citizen became a slave for his debts, or on account of ingratitude, in which case he lost, not only the citizenship, but also his freedom. In such cases he ceased to be a legal subject, and became a mere thing. There remained only the homo who had neither caput nor persona; this was the severest case of capitis deminutio.

The “capitis deminutio media” took place when a Roman remained free but lost his citizenship; this happened when he was driven into exsilium by means of the *aquæ et ignis interdictio*, and in later times also when he became a *deportatus*. Again, he might lose the civitas by renunciation, but in this case he remained a persona by the *jus gentium*, though not by the *jus civile Romanorum*.

In the “capitis deminutio minima” a Roman citizen retained both liberty and the citizenship, but was removed from the agnatic circle, and transferred from the family, in the technical sense of that term, thus losing all his family rights. He might obtain larger or more valuable rights in the family into which he entered, but those of his former family were all extinguished. The capitis deminutio minima may be threefold. The citizen may become *sui juris*, and thus

attain to the dignity of being the head of a new family, as in the case of emancipation. Or, a man who was *sui juris* might become by arrogation, or by legitimation, a *filius familias* in another family. He entered the family of the *pater arrogator* or the *pater legitimarius*. Or, finally a *capitis deminutio minima* might be effected where the *datio in adoptionem* took place, and the son given in adoption entered the family of the *pater adoptans*.

160. *Maxima est capitis diminutio, cum aliquis simul et civitatem et libertatem amittit; quæ (c) . . . qui ex patria; item femine liberæ ex senatusconsulto Claudiano ancillæ fiunt eorum dominorum, quibus in-vitis et denunciatis, nihilo minus cum servis eorum coierint.*

160. The *maxima capitis deminutio* is, when a man loses both his citizenship and his liberty; . . . which happens to those who are expelled from their country; also free women, by virtue of the *senatus-consultum* of Claudius, become the slaves of those masters, with whose slaves they have had intercourse, in opposition to the will and warning of their masters.

JUST. I. 16. 1.

(x) Lachmann proposes to fill up the first gap and the commencement of the second on the supposition that Gaius had quoted as the first example of the *maxima capitis deminutio* the sale of an *incensus*; this induces him to think the reading *agentua*, received by Blume after *ex patria*, refers to the sale of an *incensus* with the condition that no one should buy him out of his *patria gentilitas*. Huschke is quite satisfied that this conjecture is erroneous, for according to the pre-imperial law of the state no Roman citizen could by his own act forfeit his freedom. Thus it was necessary that the sale of an *incensus* should take place "trans Tiberim," in a foreign country. Such was also the case with the *judicatus* or *nexus*. It is proposed, having respect to the words legible in the manuscript, to read in this case "quæ amittuntur velut ab iis, qui ex patria jure gentium violato peregrinis populis per patrem patratum (vel fetiales) deduntur." Gaius naturally began with an ex-

ample of the *maxima capitis diminutio* taken from the *jus gentium*. Compare Liv. 5. 36. *postulatumque, ut pro jure gentium violato Fabii dederentur*. Cic. pro Cæc. 34. "Quid? quem pater patratus dedit, aut suus pater populusve vendidit, quo is jure amittit civitatem?" The term *patria* appears especially in the formula of the *jus fetiale*, Liv. 1. 32. Huschke in his edition of Gaius, p. 159. says: "Gaium duo genera hujus capitis deminutionis attulisse, unum eorum, qui ex patria peregre in servitutem venirent, alterum eorum, qui in patria servi fierent, et utriusque generis duo exempla posuisse, ex quibus Ulp. xi. 11. alterum detraxit itaque verisimile est, primi generis exempla fuisse incensum et militem non factum." (Cic. pro Cæc. 34.)

Huschke proposes to read . . "amittit, quod accidit velut in his, qui ex patria aut censum, non professi aut militiæ munus frustrati peregre veneunt, etc." . . .

It may be observed that the *incensus* was one who had not delivered an account of his name and property to the censor. Those persons who thus neglected registration were called *incensi*, and were liable to be sold, and thus to lose their liberty. Such indeed were supposed by a *fictio juris* to have given up their citizenship. Those also who refused to perform military service might be sold in a similar manner. Ulpianus says: "Maxima capitis diminutio est, per quam et civitas et libertas amittuntur, veluti cum *incensus* venierit, etc." Frag. xi. 11. Every Roman citizen was bound by law to inscribe himself in the census, to state the tribe to which he belonged, the name of his father, of his grandfather, and of his wife and children, his age, whether he dwelt in the city or not, the land that he owned, and the value of the property he possessed. This statement must be confirmed by his oath. The omission to do so involved for the defaulter the loss of freedom, and rendered the *incensus* liable to be sold into slavery. Dionys. iv. 15. v. 75. xi. 63. Cic. de legiti. iii. 3. Lex tabul. Heracleensis lin. 142. 148. Haubold Mon. p. 129. Walther's Rechts Gesch. sec. 164.

161. *Minor capitis diminutio est, cum civitas quidem amittitur, libertas vero retinetur. Quod accidit ei cui aqua et igni interdictum fuerit.*

161. The *minor capitis diminutio* is when a man loses his *civitas*, but still retains his freedom; this is the case with those who are condemned to the interdiction of fire and water.

JUST. I. 16. 2.

162. *Minima capitis diminutio est, cum et civitas et libertas retinetur, sed status hominis commutatur. Quod accidit in his qui adoptantur, item in his qui coemptionem faciunt, et in his qui mancipio dantur, quique ex mancipatione manumittuntur; adeo quidem, ut quotiens quisque mancipetur, aut remancipetur, toties capite diminuatur.*

162. The *minima capitis diminutio* is, when a person's status is changed without forfeiture, either of the *civitas* or liberty; this is the case with those who are given in adoption, also with those who conclude a *coemptio*, as well as with those who are given in *mancipium* and with those who are emancipated; so that, each time any one is mancipated or remancipated, so often he suffers a *capitis diminutio*.

JUST. I. 16. 3.

163. *Nec solum majoribus diminutionibus jus agnationis corrumpitur, sed etiam minima. Et ideo si ex duobus liberis alterum pater emancipaverit, post obitum ejus neuter alteri agnationis jure tutor esse poterit. (y)*

163. Not only is the right of agnation broken by the greater *deminutio*, but also by the least; thus if a father has emancipated one of two children, then on his death, neither of the children can by the *jus agnatio* be tutor to the other.

(y) The effect of every species of *capitis deminutio* was to break the agnatic bond. It followed as a consequence from this that the rights and obligations belonging to agnation disappeared when a person was the subject of any one of the "*capitis deminutiones*." Gaius applies this principle only to the *tutela*, but there is no doubt that it was the same in regard to succession. Under Anastasius all the rights of succession and the charge of the *tutela* were maintained in the case of the agnate who had only been subjected to the *minima capitis deminutio*. 1. 4. Cod. de legit. tut. (5. 30). Justinian decided, "*Ut emancipatus filius et filia*

non solum in paternis bonis ad suorum similitudinem succedant, sed etiam in fratrum vel sororum suarum successione, sive omnessui sive omnesemancipati sunt, sive permixti æquo jure invicem sibi succedant, et non secundum legem Anastasianam parte aliqua deminuta." 1. 15. s. 1. Cod. de legit. (6. 58) hered. Domenget in loco.

164. Cum autem ad agnatos tutela *pertinet*, non simul ad omnes *pertinet*, set ad eos tantum qui proximo gradu sunt. (z)

164. Moreover although the *tutela* affects the agnatic kinsmen as a class, it does not appertain to all at the same time, but only to those who are in the nearest degree of relationship.

JUST. I. 16. 7.

(z) After the first few sentences of this section a whole page is obliterated. Huschke says; "In hac pagina, ex qua pauca tantum litterarum vestigia, eaque incerta expiscari licuit, recte Hollw. conjecit, primum locum tenuisse de legitima gentilium tutela disputationem et curiosam quidem, ad quam lector remittitur;" see Gai. 3. 17. collat. Mos. et Rom. 16. sec. 1.

165. *Ex eadem lege duodecim tabularum libertorum et libertarum tutela ad patronos liberosque eorum pertinet, quæ et ipsa legitima tutela vocatur: non quia nominatim ea lege de hac tutela cavetur, sed quia perinde accepta est per interpretationem, atque si verbis legis introducta esset. Eo enim ipso, quod hereditates libertorum libertarumque, si intestati decessissent, jusserat lex ad patronos liberosve eorum pertinere, crediderunt veteres voluisse legem etiam tutelas ad eos pertinere, cum et agnatos quos ad hereditatem vocavit, eosdem et tutores esse jusserat.*

165. According to the same law of the Twelve Tables, the guardianship (*tutela*) of freedmen and freed women is assigned to their patrons and the children of such patrons. This guardianship is designated "legal" (*legitima*), not because there is in the *lex* any special provision for such guardianship, but because it has been adopted from the exposition of this law, just as if it had been expressly established. For, since the law had provided that the rights of succession to freedmen or freedwomen dying intestate should belong to their patrons or the children of the latter, the ancients believed the

law designed that the *tutela* also should pertain to them; because it had ordered that the same agnates whom it had called to the heirship should be tutors. (a)

JUST. i. 17.

(a) When a freedman remained in the service of his master and enjoyed his protection, the master was called the patronus from the moment that the slave was manumitted. The origin, however, of the right of patronage lay far deeper in Roman Law than the instance of patronage just mentioned would lead one to suppose. The *family*, as is well known, stood in close relationship to the *gens*, while the *clientes* and *patroni* of the ancient law preceded, and furnished to a certain extent, the pattern for the *patronatus* of the manumissor over those whom he had manumitted in the later private law of Rome. In ancient Rome it was essentially a mutual relation that subsisted between the patron and his client, giving rise to mutual rights and mutual obligations. It was not the obligation which united together the master and his freedman, but one that arose—although this has been doubted—from the free choice of the parties. Cicero speaks of this *jus adplicationis*, or right of the patron, in his time as “*jus ignotum atque obscurum*,” de Orat. l. 39. Passing over without further comment the relation subsisting between the patrons and clients in ancient times, it must suffice to observe here that in more recent times the right of the patron was based upon the fact that he had manumitted the person over whom he had the *jura patronatus*. The most important *jus* of the patron was the right of inheritance which he had, upon the death of the person manumitted by him, to the property left by the *libertus* or *liberta*. Referring to the *patronatus*, Aulus Gellius says: “*Ex moribus populi Romani primum juxta parentes locum tenere pupillos debere, . . . secundum eos proximum locum clientes habere, qui sese itidem in fidem patrocini-*

que nostrum dediderint." Gell. v. 13. Dion. Hal. 2. 8. seq. Plut. Rom. 13. As the relation of *liberi* has its origin in nature, so that of the *liberti* arose through the legal act known as manumission. Hence there is a far-reaching parallel between the pater and the patronus. In classical law, as to guardianship, the law of inheritance, and the actio, the patron and his agnates are to the *libertus* what the parent and his agnates are to the *ingenuus civis*. There was also a moral obligation, as well as a legal one, arising out of these relations which showed itself in an important variety of ways; giving rise to the rights of *obsequia et reverentia*. So that if there were any violation of these, on the part of the *libertus*, he became an *ingratus*; and such violation might be followed by *revocatio in servitutem*. Thus Ulpianus says, "Liberto et filio semper honesta et sancta persona patris ac patroni videri debet." l. 9. Dig. de obseq. (37. 15.) Again, "Inter conlibertos pietatis ratio secundum naturam salva esse debet." l. 1. sec. 1. Dig. eod. In consequence of this moral element, it was not allowable for one who had been manumitted to use any legal remedy which would touch or disturb the honour of the patron, nor without the permission of a magistrate to bring an action against him.

The *pietas* which the child owed to its parent did not involve the loss of the freedom of the will, as was the case with the slave. The *operæ obsequiæ* which children were bound to perform were not *serviles operæ*, purely relating to pecuniary matters, and hence the maxim "pietatem liberi parentibus, non operas debent," tit. cit. (37. 15) l. 10 ibid. If the patronus had several descendants, he could devise his interest in the property of the manumissi, either to one, or to several of them as he chose. Boecking Instit. p. 107, et seq. Puchta's Instit. vol. iii. p. 196, et seq., Dict Gr. and Rom. Antiq. Articles "Client" and "Patronus."

166. Exemplo patronorum etiam fiduciariæ tutela receptæ sunt. Eæ enim tutelæ scilicet fiduciariæ vocan-

166. The tutela fiduciaria has also been introduced after the example of that of patrons; for those tutelæ

tur proprie, quæ ideo nobis competunt, quia liberum caput mancipatum nobis vel a parento vel a coemptionatore manumiserimus.

were called *fiduciariæ* in a peculiar sense, which were incumbent on us, because we had manumitted a free person the head of a family, who was mancipated to us by his agnate ascendant, or by coemption.

JUST. I. 19.

167. Set Latinarum et Latinorum inpuberum tutela non omni modo ad manumissores, sicut bona eorum, pertinet sed ad eos quorum ante manumissionem ex jure Quiritium fuerunt: unde si ancilla ex jure Quiritium tua sit, in bonis mea, a me quidem solo, non etiam a te manumissa, Latina fieri potest, et bona ejus ad me pertinent, sed ejus tutela tibi competit: nam ita lege Junia cavetur. Itaque si ab eo cujus et in bonis et ex jure Quiritium ancilla fuerit facta sit Latina, ad eundem et bona et tutela pertinet. (b)

167. But the tutela over Latinæ and Latini when minors belongs as their inheritance, not to those persons who have manumitted them, but to those whose property they were, ex jure Quiritium before their manumission. Hence if a female slave belongs to you ex jure Quiritium, but is mine in bonis, and she has been manumitted by my intervention only, and not by yours, she can become a Latina, and in this case her property belongs to me, but the tutela over her falls to you; for the lex Junia so provides. And thus if she be made a Latina by him who owns her both in bonis and ex jure Quiritium, then her property and tutela belong to the same man.

(b) The text presents a departure from the rule contained in the next section, in which we see that the tutela was imposed as a duty upon those who had some expectations from the succession. There were also other instances in which the strict rule as to the tutela was not held to apply. Thus the manumissus, who as a slave had belonged to a man and a woman would be under the tutela of the son of his former patron, if the tutela should arise, although the patron had the right to succeed to his entire property if he had become a Roman citizen, and to the moiety if he were a Latinus, the other moiety then devolving upon the son of his patron. "Legitimæ tutelæ lege duodecim tabularum agnatis delatæ sunt, et consanguineis, item

patronis, id est his qui ad legitimam hereditatem admitti possint. Hoc summa providentia, ut, *qui sperarent hanc successionem*, iidem tuerentur bona, ne dilapidarentur." l. 1 pr. Dig. de leg. tutor. (26. 4.) See also Gai. iii. sec. 60. Again, the enfranchised impubes, assigned by a testator to his daughters, fell under the tutela of the brothers of the latter, who, however, inherited the succession. "Idem erit, si filiae assignatus libertus sit, tutela quidem apud fratres remanebit, ut Marcellus notat, legitima autem hereditas ad sororem pertinebit." l. 1. sec. 3. Dig. de leg. tut. (26. 4.) Domenget in loco.

168. *Agnatis, qui legitimi tutores sunt, item manumissoribus* permissum est feminarum tutelam alii in jure cedere: pupillorum autem tutelam non est permissum cedere, quia . . . n videtur . . . osa, (c) cum tempore pubertatis finiatur.

168. Those agnates who are *tutores legitimi*, as well as those who are *manumissores*, are allowed to cede before a magistrate (*in jure*) the *tutela* of women to a third person, but they are not permitted to surrender the *tutela* of pupils, because this does not seem to be burdensome, since it ends at the time of puberty.

JUST. I. 19.

(c) *Quia non videtur annosa* (because this does not appear to be for many years) is the conjecture of Hollweg, and is accepted by Boecking. Huschke gives as his emendation "*quia non videtur onerosa, etc.*," and says "*Sed annosum est quod jam habet, non quod duraturum est multos annos.*" This emendation is adopted in the translation.

169. Is autem cui ceditur tutela cessicius tutor vocatur. (d)

169. He to whom the *tutela* is surrendered is called the *cessicius tutor*.

(d) *Cessicius tutor vocatur*. There were, as already observed tutors of different denominations. It may assist the student to distinguish them if we note the different kinds of tutors. The text explains how the name *tutor cessicius* arose. Ulpianus also says: "Is cui tutela in jure cessa est,

cessicius tutor appellatur." Frag. xi. 7. The "Tutor Atilianus" was the tutor given in accordance with the provisions of the *lex Atilia*, by the *prætor urbanus* and the major part of the tribunes of the Plebs: a tutor of a similar character was given by the presidents of the provinces in virtue of the *lex Julia et Titia*. "Tutores dativi," as we see from *Gaius* i. 150—152, are the tutors named by the testator himself; "Tutores optivi" were those chosen by women who had the *optio*, and received their name from the exercise of this choice; "Tutores legitimi" were agnate tutors given by virtue of the law of the XII Tables. In the most ancient law of Rome, if there were no testament, and no agnates, the gens undertook the tutorship, and were called to do so by a *lex*. In the second stage of the law the appointment was made by a magistrate. The *datio tutoris*, however, did not appertain to the magistrate, simply by virtue of his *jurisdictio* or his *imperium*, he must needs be empowered thus to appoint by law. "Tutoris datio neque imperii est, neque jurisdictionis, sed ei soli competit, cui nominatim hoc dedit vel *lex*, vel *senatus-consultum*, vel princeps." 1. 6. sec. 2. *Dig. de tutelis* (26. 1.) The "Tutor Prætorius" was the tutor appointed by a magistrate for a single transaction; or when the pupil had a tutor, and this tutor was prevented from entering upon his duties, or when there was some impediment to his acting, as for example if some business arose between the tutor himself and the pupil; or when the tutor appointed was absent, and not able to attend to the discharge of his duties. An agnate ascendant, as we have seen, might give the child or grandchild under his *potestas* in *mancipium* to another man on condition that the child be reconveyed to himself. The *tutela fiduciaria* was introduced after the example thus presented. A woman could liberate herself from the *tutela* of her agnates by means of the "*coemptio cum extraneo fidei-cie causa*." This tutor was called the Tutor Fiduciarius, and it was usual to select a childless old man. Every *coemption* pre-supposed the *auctoritas* of the tutor for the time being.

Hence the woman could only have a Tutor Fiduciarius, when she had a Tutor Dativus or agnates who were disposed to yield to her wishes. When there are several tutors, one may especially charge himself with the duties of the tutorial office, in which case he is called the *Tutor Gerens*: the others, who have then simply the task of seeing that the Tutor Gerens does his duty, are called *Tutores Honorarii*. Puchta ii. p. 211. iii. pp. 298e. 302m. See Gai. i. ss. 166, 172, 175. Cic. pro Mur. c. 12. ad fam. ii. 19. Top. 4.

170. Quo mortuo aut capite diminutio revertitur ad eum tutorem tutela qui cessit. Ipse quoque qui cessit, si mortuus aut capite diminutus sit, a cessicio tutela discedit et revertitur ad eum, qui post eum qui cesserat secundum gradum in tutela habuerit.

170. After his death or *capitis deminutio* the *tutela* reverts to the tutor who has ceded it; if this tutor die or suffer a *capitis deminutio*, the *tutela* departs from the *cessicius*, and reverts to the person who, as it respects the *tutela*, was next in order to him who had surrendered it.

171. Set quantum ad agnatos pertinet, nihil hoc tempore de cessicia tutela quæritur, cum agnatorum tutelæ in feminis lege Claudia sublatae sint.

171. But as far as relates to agnates, at the present time no question is raised in regard to *cessicia tutela*, since by the *lex Claudia* the *tutela* of agnates, with respect to women, have been abolished.

172. Sed fiduciarios quoque quidam putaverunt cedendæ tutelæ jus non habere, cum ipsi se oneri subjecerint. Quod etsi placeat, in parente tamen qui filiam neptemve aut proneptem alteri ea lege mancipio dedit, ut sibi remaniciparetur, remanipatatamque manumisit, idem dici non debet, cum is et legitimus tutor habeatur; et non minus huic quam patronis honor præstandus est. (e)

172. But also the *fiduciarii tutores* have not, according to the opinion of some, the right of surrendering the *tutela*, since they have voluntarily undertaken the burden. But even if this opinion is received, still it ought not to be affirmed of the agnate ascendant (*parens*) who has given his daughter, or grand-daughter, or great grand-daughter in *mancipium* to another on condition (*ea lege*) that she be reconveyed to himself, and has manumitted her after she has been reconveyed, since he, too, is held as a statutory tutor; and not less honour should be rendered to him than to the patrons.

(e) In relation to the rights and duties of the tutor, it is to be observed that they dated from the very instant in which the tutor had notice of the tutorship. The tutor was required to obtain the decree of the authorities sanctioning his appointment, and transferring to him the management of the property of his ward. He must also take the oath appointed for tutors, give adequate bail or security, and finally obtain an inventory of his ward's property. After these preliminaries were attended to, his care for the person and the property of his ward commenced.

With due and proper attention to the wishes of the deceased father of his pupil, and under the inspection, and with the cooperation of the authorities, the tutor must defend, nurture, and educate his ward. The principal duties, however, of the tutor, it should be remembered, related to the management of his ward's property. As far as this was concerned, he was answerable for *diligentia in concreto*, and when he had himself sought the tutorship for *omnis culpa*. The tutor was bound to guard against what in modern law is termed waste; he must call in all the assets of his ward's estate at the right time, and invest all funds upon proper and valid security. It was the tutor's duty to rebuild, or let immoveable property at the best rate. He could not be liberal at the cost of his pupil, and he must pay his lawful debts without waiting to be sued. In the older law the tutor had an unlimited right of alienation, but in later law the tutor could not alienate his ward's property without the decree of a magistrate empowering him to do so. The pupil could claim by *cindicatio* anything illegally alienated, but must prove that the thing for which he thus sued was his property. The defendant to succeed must prove the permission of the proper magistrate authorising the alienation; but the ward might protect himself and recover his property if he could show that there were any defect in the magisterial permission. The tutor, however, was permitted to alienate fruits and perishable things. He could also alienate, if permitted by the testator or by the

regent, or if the plaintiff took an oath affirming his right to sell at the time of the alienation; or if the alienation were compulsory, as in the case of a socius; or if the ward had pledged a thing, and was unable to realize his money without sale and alienation. An alienation invalid at the commencement might convalesce—as, for example, by the ratification of the pupil upon his coming of age, or when the ward became heir to the estate of his guardian, and *vice versa*; or by lapse of time; and, in the modern civil law, after the space of five years.

173. *Præterea senatusconsulto mulieribus permissum est in absentis tutoris locum aliam petere: quo petito prior desinit. Nec interest quam longe aberit is tutor.*

173. Moreover women are permitted by a *senatus-consultum* to demand another tutor in the place of one who is absent; after whose appointment the former tutor ceases to act; nor is it of any consequence how long the tutor has been absent.

174. *Set excipitur, ne in absentis patroni locum liceat libertæ tutorem petere.*

174. But there is an exception; freed-women cannot petition for a tutor in the place of an absent patron.

175. *Patroni autem loco habemus etiam parentem qui in e mancipio sibi remancipatam filiam neptemve aut proneptem manumissione legitimam tutelam nactus est. Hujus quidem liberi fiduciarii tutoris loco numerantur: patroni autem liberi eandem tutelam adipiscuntur, quam et pater eorum habuit.*

175. But we have in the place of the patron also the agnate ascendant, who has obtained the legal *tutela* by manumission over a daughter, granddaughter, or great grand-daughter who has been emancipated by him. His children succeed to the place of a tutor *fiduciarius*, but the children of the patron obtain the same *tutela* which their father had.

176. *Sed ad certam quidem causam etiam in patroni absentis locum permisit senatus tutorem petere, veluti ad hereditatem adeundam. (f)*

176. There are, however, some grounds on account of which the senate permits a tutor to be selected in the place of an absent patron; for example, upon the entrance to an inheritance.

(f) The commencement of this section is unlike the style of Gaius, and does not suggest the probable completion of the lacuna. Huschke suggests as better, “ad certas tamen res, vel causas etiam in patroni absentis locum permisit senatus tutorem petere, etc.” It appears from Ulp. xi. 22, that this is the same senatus-consultum as that mentioned in Gaius, i. 173. Ulpianus says, “Item ex senatus-consulto tutor datur mulieri ei cujus tutor abest, præterquam si patronus sit qui abest; nam in locum patroni absentis aliter peti non potest, nisi ad hereditatem adeundam et nuptias contrahendas. Idemque permisit in pupillo patroni filio.” This senatus-consultum was passed for two objects, “ad hereditatem adeundam et nuptias contrahendas,” and, in the absence of one patron, to secure the appointment of another in his place. Gaius does not go into the second case, as being past the comprehension of a beginner. Huschke’s Kritik, pp. 29, 30, and Gaius, sec. 176, note 7.

177. Idem senatus censuit et in persona pupilli patroni filii.

177. The senate has also resolved the same in reference to the son of a patron who is under the tutela.

178. Itemque lege Julia de maritandis ordinibus (g) ei quæ in legitima tutela pupilli sit permittitur, dotis constituendæ gratia a Prætor urbano tutorem petere.

178. For so also by the *lex Julia* (*de maritandis ordinibus*) concerning marriages, those persons who are under the *tutela legitima* can, for the sake of agreeing upon their dowry, ask for a tutor from the *Prætor urbanus*.

(g) *Itemque lege Julia de maritandis ordinibus*. The law here referred to is sometimes cited as the *lex Julia*, sometimes as the *lex Papia Poppæa*, sometimes as the *lex Julia et Papia*, and by Gaius in the present section as the *lex de Maritandis Ordinibus*. It was enacted as the *lex Julia*, 18 B.C. but did not come into legal operation till some years afterwards. The principal provisions of this law may be arranged under two heads:—Marriage and Caduca, or

lapsed status. The origin of this important law is probably to be traced to the peculiar condition of the Roman empire. It was considered by the emperor to be the duty of a good citizen not to remain single; and it appertained to the office of the censor to admonish men who did not endeavour to found families. Various advantages were held out to the fathers of many children, while the confirmed old bachelor had to pay a pecuniary impost known as “*æs uxorum*.” (Paul. Diac. ex Festo. v. *uxorum*. Val. Max. ii. 9. 1. Cic. de leg. iii. 3: *Cælibes esse prohibento*. Liv. 45. 15. Gell. 5. 19.) Cæsar divided the lands of the Campagna among those citizens who were the fathers of three or more children. A few years after the battle of Actium, at the time of his sixth consulate (726 A.U.C.), the emperor by an edict determined several points in relation to this important subject. But it was not till the year 736 A.U.C. that he made a proposal to the senate to pass a law, in which proposal legal disadvantages were made to attach to celibacy, and rewards were held out for marriage, the raising of a family, and the training of children.

It was with difficulty that Augustus obtained the favourable decision of the senate. The lex “*de maritandis ordinibus*,” found in the *senatus-consultum* “*de ludis sæcularibus*,” was submitted for the approval of the Plebs, but rejected by them amid great tumult. Augustus was compelled to allow the matter to remain *in statu quo*, yielding to the opposition of the people, but convinced in his own mind that the encouragement of marriage was of prime importance for securing the interests of an empire, whose population had been reduced by long, cruel, and destructive wars. Towards the close of his rule the law was revised, the penalty of remaining unmarried was mitigated, and the rewards of those who resolved to enter into the married state were increased. A *vacatio*, or period of three years, was to be allowed to expire before the law should come into operation; subject to this condition, in

the consulate of S. Ælius Catus and C. Sentius Saturninus, (757 A.U.C.) the *lex Julia maritandis ordinibus* was passed. This *Vacatio* came to an end A.U.C. 760, when the emperor was compelled to approve of another delay extending over a period of two years; so that it was not till 762 A.U.C. that the law came into full operation. The equites now opposed the law in the most violent manner, and demanded its repeal. Augustus did not yield to their request, but granted a further delay of a year, at the end of which period a second law was passed, into which were introduced many new clauses upon the same subject. This is the law known as the *lex Papia Poppæa*, which derives its name from the two consules *suffecti* who held office that year—M. Papius Mutilus and Q. Poppæus Secundus. As these laws were not blended nor incorporated the one in the other, they are properly cited as the *lex Julia* or the *lex Papia*, and, when quoted in combination, are styled the *lex Julia et Papia Poppæa*. These statutes contain several chapters, divided, as already observed, under two principal heads. I. *De Maritandis Ordinibus* (*pars nuptialis*), which includes rules affecting marriage, and the advantages to be obtained in the State by married people who have children. II. *De Caducis* (*caducaria*), setting forth the penalties of celibacy and childlessness. The effect of this law upon those who lived in celibacy was such that celibates could neither take inheritances, nor enjoy bequests unless they were married within a hundred days from the time they become entitled, while married persons who were childless (*orbi*) could only take half the *hereditas* or *legatum* which devolved upon them. Ulpianus says: “*Quod quis sibi testamento relictum, ita ut jure civili capere possit, aliqua ex causa non ceperit, caducum appellatur, veluti ceciderit ab eo: verbi gratia si cælibi vel Latino Juniano legatum fuerit, nec intra dies centum vel cælebs legi paruerit, vel Latinus jus Quiritium consecutus sit.*” Tit. xvii. 1. There has been a good deal of discussion as to the object of the emperor in so pertinaciously pressing this singular and obnoxious law. The political

reason was most likely that already given. The depravity introduced by the terrible wars of the republic had brought, as wars ever must, a long train of domestic and moral evils. The object of these laws was to cherish domestic life and promote personal virtue. The Romans seem to have thought that the aim of the emperor was not only to punish celibacy but, by increasing the number of his subjects, to augment the wealth of the empire. Hence Tacitus, with elegant scorn, in referring to the law says: "*Relatum deinde de moderanda Papia Poppæa, quam senior Augustus, post Julias rogationes, incitandis calibum pœnis et augendo ærario sanxerat.*" Tac. Annal. iii. 25.

By the privileges and rewards given to the heads of increasing families an avenue was prepared for more frequent domestic visitation on the part of the officers of the State, legalizing a system of espionage which the keen irony of Tacitus was not slow to expose. "*Acriora ex eo vincla, inditi custodes, et lege Papia Poppæa præmiis inducti ut si a privilegiis parentum cessaretur, velut parens omnium populus vacantia teneret, sed altius penetrabant; urbemque, et Italiam, et quod usquam civium, corripuerunt, multorumque excisi status.*" Tac. Annal. iii. 28. Dio. Cass. 16. Gruter. inscrip. p. 326. Hanbold (Spangenberg) manum legal. p. 163. Suet. Octa. 34. Propert. Eleg ii. 7. Plin. paneg. 34. Article Julia lex. et Papia Poppæa in Dict. Gr. Rom. Antiq. Puchta's Instit. vol. i. sec. 107.

179. Sane patroni filius etiamsi impubes sit, libertæ efficietur tutor, at in nulla re auctor fieri potest, cum ipsi nihil permissum sit sine tutoris auctoritate agere.

179. The son of a patron, although he be a minor, will be tutor to a freed-woman, but he cannot become *auctor* in any matter, since he can do nothing legally himself without the authority of his tutor.

180. Item si qua in tutela legitima furiosi aut muti sit, permittitur ei senatusconsulto dotis constituendæ gratia tutorem petere.

180. Again, if a woman is under the *tutela legitima* of an insane or dumb person, she can, by the same senatusconsultum, ask for a tutor for the purpose of agreeing upon a dowry.

181. Quibus casibus salvam manere tutelam patrono patronique filio manifestum est.

181. In such cases it is evident that the *tutela* is preserved to the patron and the son of the patron.

182. Præterea senatus censuit, ut si tutor pupilli pupillaove suspectus a tutela remotus sit, sive ex justa causa fuerit excusatus, in locum ejus alius tutor *detur*, quo dato prior tutor amittit tutelam. (*h*)

182. Moreover, the senate has decided that when the tutor, being distrusted, has been removed from the *tutela*, or has been excused on a legally acknowledged ground, (*ex justa causa*) another tutor shall be appointed in his place, from the date of whose appointment the former tutor shall lose his *tutela*.

(*h*) The pupil was secured against the possibility of any wrong on the part of the tutor, by several precautions. The tutor might be removed in accordance with the provision of the Twelve Tables. "De tutore suspecto, et de condemnatione in duplum." Tryphoninus says, "Sed si ipsi tutores rem pupilli furati sunt, videamus an ea actione quæ proponitur ex lege XII tabularum adversus tutorem in duplum, singuli in solidum teneantur." 1. 1. sec. 2. Dig. de susp. tut. (26. 10.) The proceedings against a tutor suspectus might be either on the ground of infidelity or of negligence, *suspecti crimen* or *postulatio*, a quasi public accusation. The co-tutors were bound to take legal proceedings against the tutor suspectus, or the public authorities might do so *ex officio*. The tutor was removed either *cum infamia* on account of the unfaithful discharge of his duty, or he might be adjudged to the penalty of *culpa lata*. If he were found simply incompetent he might be removed *sine infamia*. 1. 9. Cod. de susp. tut. (5. 32.) sec. 6. Instit. eod. (1. 26.) Puchta's Instit. vol. iii. p. 242 et seq.

183. Hæc omnia similiter et Romæ et in provinciis solent observari . . . si vero . . .

183. All these things are equally to be observed at Rome and in the provinces.

184. Olim cum legis actiones (i) in usu erant, etiam ex illa causa tutor dabatur, si inter tutorem et mulierem pupillumve legis actione agendum erat: nam quia ipse quidem tutor in re sua auctor esse non poterat, alius dabatur, quo auctore illa legis actio perageretur: qui dicebatur prætorius tutor, quia a Præture urbano dabatur. Post sublatas legis actiones quidam putant hanc speciem dandi tutoris non esse necessariam; sed adhuc dari in usu est, si legitimo judicio agatur.

184. Formerly, when the *legis actiones* were in use, a new tutor was named every time there was an action between the tutor and the woman, or pupil subjected to his *tutela*. Because the tutor could not be plaintiff (auctor) in his own suit, another was appointed under whose authority it was necessary to carry on the suit; he was called *tutor prætorius*, since he was appointed by the *prætor urbanus*. Some are of opinion that after the method of procedure by *legis actiones* was superseded this mode of appointing a tutor was not necessary; but it is still in use with reference to a *legitimum judicium*.

(i) For an account of the “*legis actiones*” see Gai. iv. ss. 12—39. Ulpianus says, “*Moribus tutor datur mulieri pupillove, qui cum tutore suo lege aut legitimo judicio agere vult, ut auctore eo agat (ipse enim tutor in rem suam auctor fieri non potest), qui prætorianus tutor dicitur, quia a prætore urbis dari consuevit.*” Tit. xi. 24. pr. Just. de iis, per quos agere (4.10). Huschke says, “*pro tutela;*” Nam et ibi legendum est: “*si qui quæve in cujus eorum tutela,*” ut ex lege Hostilia prætor quasi protutorem daret, etiam si furti lege agendum esset a pupillo vel muliere, cujus tutor apud hostes vel reip. c. absens erat: quem casum Gai. iv. 82. rectius omisit, quia hic non tam tutor quam pupillus tutore agebat. De aliorum sententiis cf. Keller Civil pr. note 631. Huschke in Gai. note s. 184.

185. Si cui nullus omnino tutorsit, ei datur in urbe Roma ex lege Atilia a Præture urbano et majore parte Tribunorum plebis, qui Atilianus tutor vocatur; in provinciis vero a Præsidibus provinciarum ex lege Julia et Titia.

185. If a person has no tutor at all, then in the city of Rome itself, by virtue of the *lex Atilia*, a tutor called *tutor Atilianus* is appointed by the prætor of the city and the majority of the tribunes of the Plebs; but, if in the provinces, the tutor is

[De lege Julia et Titia vide supra p. 159 et post p. 193.]

named by the presidents of the provinces in accordance with the *lex Julia et Titia*.

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186. Et ideo si cui testamento tutor sub condicione aut ex die certo datus sit, quamdiu condicio aut dies pendet, tutor dari *potest*; item si pure datus fuerit, quamdiu nemo heres existat, tamdiu ex *his* legibus tutor petendus est: qui desinit tutor esse postea *quam* quis ex testamento tutor esse cœperit. (j)

186. And thus if to any one a tutor has been appointed by will, under a certain condition, or to enter on his functions on a fixed day, a tutor may be given until the condition is satisfied, or the day arrives. Also, if a tutor has been given unconditionally, yet, so long as no one appears as heir, another tutor must be appointed by law who ceases to act as tutor when some one subsequently commences his tutorship under the will.

(j) By the term *Conditio* is to be understood in Roman law that uncertain event, upon the happening or non-happening of which various legal consequences are made to depend. This definition of *conditio* only embraces the limited and special sense in which the word is employed. Tit. Dig. de cond. ins. (28. 7.) Tit. Dig. de cond. (35. 1.) Pomponius says, "*Conditio—aut in præteritum concepta ponitur, aut in præsens, aut in futurum.*" l. 16. Dig. de injusto, etc. (28. 3.) But a really true condition is always dependent upon an uncertain event which is *in futuro*. A great number of legal transactions may be made conditionally; as, for example, a stipulation, a promise, an obligation, the institution of an heir, or a bequest—"Sub conditione stipulari, promittere, debere, heredem instituere, legare, etc." Sec. 4. Inst. de verb. oblig. (3. 15) l. 26. Dig. de cond. instit. (28. 7.) l. 14. Dig. de novat. et deleg. (46. 2.) l. 10, 213. pr. Dig. de verb. sig. (50. 16.) A condition is said to be *suspensiva*, when the commencement of a legal transaction is made dependent upon it, and *resolutiva* when the termination of such a transaction is similarly dependent

thereon. A condition may be either affirmative or negative, according as the validity of something happening or not happening is made to depend upon it. It is called *potestiva* if the uncertain event is placed in the free choice of the person upon whom it is made to depend. A *conditio potestiva* Paulus calls *promiscua*. "Item sciendum est, promiscuas conditiones post mortem impleri oportere, si in hoc fiant, ut testamento pareatur, veluti si Capitolium ascenderit, et similia non promiscuas etiam vivo testatore existere posse, veluti si Titius Consul factus fuerit. l. 11. sec. 1. de condit. et dem. (35. 1.) See also Mühlenbruch in the continuation of Gluck's commentary, part 36. sec. 357. note 8.

Justinian mentions the *conditio potestiva* in opposition to the *conditio casualis*, and says that there may be a *conditio mixta*, the fulfilment of which may depend partly upon the will of a person and partly on circumstances; l. unica. sec. 7. Cod. de cad. tol. (6. 51.) As long as it is uncertain whether the condition will be fulfilled, it is said *conditio pendet*. When the condition has occurred, then the civilians say *conditio existit*. If it is certain that the condition can never take place, then it is said *conditio deficit*. Other terms besides *existit* are also employed to express that the condition has actually occurred. Thus it is said "conditio existit, impletur, impleta, expleta est," l. 16. Dig. de condic. indeb. (12. 6.) l. 14. pr. Dig. de condic. furt. (13. 1.) l. 25. Dig. de condit. et demonstr. (35. 1.) l. 14. Dig. de nova. et deleg. (46. 2.) A fundamental maxim in relation to conditions is "conditio existens retrahitur ad initium negotii." This maxim, however, does not hold good when the existence of the condition depends upon the will of the party entitled to impose it, or upon the will of the party who is to be bound thereby, since in such cases it would be possible at any moment to determine the existence of the condition. Conditions are said to be *necessariæ* when it is certain either that they must happen, or that they cannot come to pass. Conditions may be also *impossibiles*, or *turpes*, or *tacitæ*, or *juris*, or *perplexæ*. *Dies* and *conditio*

should be carefully distinguished. By *dies*—when it is not a *dies incertus*, which is the same as a *conditio*—we are to understand that *certain point of time* at which some legal event must take place. It is to be distinguished from a condition by the fact that the element of uncertainty is eliminated. In the case of a *dies* the right vests at once, and only its exercise is suspended till the *dies veniens*. There is no suspension of the *dies cedens*. In the case of a *conditio* it is different, for both the *dies cedens* and the *dies veniens* are suspended. The *dies* is said to be either *a quo* or *ad quem*. *Dies* is said to be *ad quem* when the end of a transaction or legal relation is pointed at. It was not always permitted to make a legal transaction dependent on a *dies*; for instance there could be no institution of an heir *ad diem*. See Moehler Pandecten, p. 33 et seq. Heumann Handlexicon zum corp. jur. civ. art. Conditio. Compare also sec. Instit. de Atil. Tut. etc. (1. 20).

187. Ab hostibus quoque tutore capto ex his legibus tutor datur, (k) qui desinit tutor esse, si is qui captus est in civitatem reversus fuerit: nam reversus recipit tutelam jure postliminii. (l)

187. Also when a tutor has been taken prisoner by the enemy, another tutor is given under these laws, and he ceases to be tutor when the first tutor has returned from captivity; for on his return he resumes the tutela, by the *jus postliminii*.

(k) *Ab hostibus quoque tutore capto, ex his legibus tutor datur*. Huschke in his Kritik. p. 30 says, Without doubt “dabitur” is the true reading as it corresponds better with the “dari potest” and “petendus est” in s. 186, for the future tense also points to a previous petition; “datur” would express the wrong idea—that the datio was simply on account of the office itself and not on account of the captivity of the tutor.

(l) *Postliminium sive jus postliminii*, or as the Germans express it, “Rückkehrrecht” (the *jus* of a person who has returned), is the right which one possesses who has returned from hostile imprisonment to resume his previous legal

condition, so that on his return he is immediately entitled to all his former rights and privileges in their full legal effect. Justinian says, “*postliminium fingit eum, qui captus est, semper in civitate fuisse.*” Thus the *jus postliminii* was founded on the *fiction juris* that the captive had never been absent from home. This, as Mr. Long observes, was a fiction which was of easy application, for as the captive during his absence could not do any legal act, the interval of captivity was a period of legal inactivity, which was terminated by his showing himself again. By the *jus postliminii* a Roman citizen was restored to all his rights, just as if he had never been captured. Pomponius says that there were two kinds of *postliminii*: “*Quum duæ species postliminii sint, ut aut nos revertamur, aut aliquid recipiamus.*” Then he observes by way of illustration, “*Quum filius revertatur, duplicem in eo causam esse oportet postliminii, et quod pater eum reciperet, et ipse jus suum. Non ut pater filium, ita uxorem maritus jure postliminii recepit, sed consensu redintegratur matrimonium.*” l. 14. pr. sec. l. de cap. et de post. (49. 15). Paulus further defines *Postliminium* as “the right of recovering a lost thing from an extraneous, and of its being restored to its former status, which right has been established between us (the Romans) and free people and kings, by usage and enactments (*moribus ac legibus*); for what we have lost in war or even out of war, if we recover it, we are said to recover “*postliminio*,” and this usage has been introduced by natural equity, in order that he who was wrongfully detained by strangers should recover his former rights on returning into his own territories (*in fines suos*).” l. 19 Dig. tit. cit. The following instances will serve to show the important influence of this *jus postliminii*. “*Si prægnans mulier ab hostibus capta est, id quod natum est, postliminium habet.*” Again, “*Si ager ab hostibus occupatus, servusve captus liberatus fuerit, jure postliminii restituentur ususfructus.*” Again, “*Apud hostes susceptus filius si postliminio redierit, filii jura habet; habere enim eum postliminium nulla dubitatio est post*

rescriptum.” Again, “Navibus longis atque onerariis propter belli usum postliminium est, non piscatoriis, aut si quas actuarias voluptatis causa paraverunt. Equus item, aut equa freni patiens recipitur postliminio; nam sine culpa equitis proripere se potuerunt.” Marcellus then adds, exhibiting in striking terms the temper and courage of the Romans:—“Non idem in armis juris est, *quippe nec sine flagitio amittuntur*; arma enim postliminio reverti negatur, *quod turpiter amittantur*.” l. 2. Dig. de capt. et de post., etc. (49. 15). The whole of this title should be consulted on the jus postliminii, but see especially l. 9. l. 5. pr. et sec. 9. l. 19. already cited l. 5. 5. 1. Dig. de stat. hom. (1. 5) l. 26. Dig. de usufructu ea. rer. (7. 5) l. 11. sec. 4. Dig. de excep. rei. jud. (44. 2). “Dictum est autem postliminium a linine et post, unde enim, qui ab hostibus captus in fines nostros postea pervenit, *postliminio reversum* recte dicimus;” sec. 5. Ins. quibus modis, etc. (1. 12.) See also the titles to the Dig. (49. 15), to the Cod. (8. 15) and Art. “Postliminium” in Dict. Gr. et Rom. Ant.

188. Ex his apparet quot sint species tutelarum. Si vero quaeramus, in quot genera hæ species deducantur longa erit disputatio: (*m*) nam de ea re valde veteres dubitaverunt, nosque diligentius hunc tractatum exsecuti sumus et in edicti interpretatione, et in his libris quos ex Quinto Mucio (*n*) fecimus. Hoc solum tantisper sufficit admonuisse, quod quidam quinque genera esse dixerunt, ut Quintus Mucius; alii tria, ut Servius Sulpicius; alii duo, ut Labeo; alii tot genera esse crediderunt, quot etiam species essent.

188. From this it appears how many *species* of tutela there are, but if we enquire amongst how many *genera* these *species* are distributed, it would give rise to a long discussion; since as to this, the ancient jurists were very doubtful. We have pursued this enquiry somewhat carefully, both in the interpretation of the edict, as well as in those books which we have composed concerning the writings of Quintus Mucius. We are content in the meantime to mention this only, that some, like Quintus Mucius, have said that there are five *genera*; Servius Sulpicius says there are three; others, as Labeo, think there are two, while others think there are as many *genera* as there are *species*.

(m) *Nam de ea re valde veteres dubitaverunt, nosque, etc.* This is the reading of Lachmann, whilst the MS. has “nos qui.” But since Gaius would refer his reader, as the “*tantisper*” clearly shows, to the readings of the other works which he has cited, the text becomes much more consonant if we decide to read “nos quia,” and take “hoc solum,” etc., as commencing the following proposition. Huschke proposes to read as follows: “dubitaverunt nos quia diligentius—fecimus, hoc solum, etc.” Kritik. p. 31.

(n) Quintus Mucius here referred to is Q.M. Scævola, son of Q. Publius Scævola; he was Consul B.C. 95, and subsequently Pontifex Maximus, by which title he is referred to in the Digest. 1. 2. sec. 41. D. de orig. jur. (I. 2.) He had many *auditores*, and Cicero speaks of him as the most eloquent of jurists, and the most learned jurist among orators. Cic. de orat. i. 39. He was the first Roman who made a scientific arrangement of the Jus Civile. This work consisted of eighteen books, and is frequently referred to by subsequent jurists. Servius Sulpicius, Lælius Felix, Pomponius, Modestinus, as well as Gaius, commented on this book. Q. Mucius Scævola also wrote a book on Definitions from which there are four extracts in the Digest.

189. Sed inpuberes quidem in tutela esse omnium civitatum jure contingit: quia id naturali rationi conveniens est, ut is qui perfectæ ætatis non sit alterius tutela regatur. Nec fere ulla civitas est, in qua non licet parentibus liberis suis inpuberibus testamento tutorem dare: quamvis, ut supra diximus, soli cives Romani videantur tantum liberos in potestate habere.

189. But it so happens, in every state, that minors are by law in tutela; because it is consistent with natural reason that he, who is not of mature age, should be ruled by the tutela of another. And there is scarcely any state in which the agnate ascendants are not permitted to appoint, by testament, a tutor to those of their children who are minors; although, as we have said above, Roman citizens alone appear to have their children under the potestas.

190. *Feminas vero perfectæ ætatis in tutela esse fere nulla pretiosa ratio suasisse videtur. Nam quæ vulgo creditur, quia levitate animi plerumque decipiuntur, et æquum erat eas tutorum auctoritate regi, magis speciosa videtur quam vera. Mulieres enim quæ perfectæ ætatis sunt ipsæ sibi negotia tractant, et in quibusdam causis dicis gratia tutor interponit auctoritatem suam; sæpe etiam invitus auctor fieri a Prætorē cogitur.*

191. *Unde cum tutore nullum ex tutela iudicium mulieri datur: at ubi pupillorum pupillarumve negotia tutores tractant, eis post pubertatem tutelæ iudicio rationem reddunt. (o)*

190. But no valid reason appears to have been given why women of mature age should be in *tutela*; for the reason which is commonly received, that women are very often misled through want of firmness of character, and that therefore it is in accordance with equity, to govern them by the *auctoritas* of a tutor, is more specious than true; for women who have attained their majority transact their own business, and a tutor interposes his authority only in certain causes, and for the sake of form (*dicis gratia*), and he is often compelled by the prætor to become an *auctor* even against his will.

191. On this account a woman has no action (iudicium) against her tutor arising out of the *tutela*; whilst tutors who manage the affairs of their pupils render an account to the latter after they have attained their majority, and this is done by the *actio tutelæ*.

JUST. I. 20. 7.

(o) The *tutela* of adult women did not extend to the management of their property, and for this reason the tutor was exempted from any action as to the property of an adult woman. His *tutela* was effective only as supplying the necessary *auctoritas*, and in this he was not permitted the exercise of his discretion, but could be compelled to act.

192. *Sane patronorum et parentum legitimæ tutelæ vim aliquam habere intelleguntur eo, quod hi neque ad testamentum faciendum, neque ad res mancipi alienandas, neque ad obligationes suscipiendas auctores fieri coguntur, præterquam si magna causa alienandarum rerum mancipi obligationisque suscipiendæ interve-*

192. The *tutelæ legitimæ* of the patron and of agnate ascendants have indeed some legal effect, as one perceives since these tutors are not compellable to act as *auctores* in the making of a will or alienating *res mancipi*, or in regard to the obligations which their pupils wish to contract, except there be a pressing ne-

niat. (p) *Eaque omnia ipsorum causa constituta sunt, ut quia ad eos intestatarum mortuarum hereditates pertinent, neque per testamentum excludantur ab hereditate, neque alienatis pretiosioribus rebus susceptoque aere alieno minus locuples ad eos hereditas perveniat.* (q)

cessity for the alienation of *res mancipi* or contracting an obligation. All these points are determined for their own interest, since the right of succession to such of the pupils as die intestate falls to them, and they must not be excluded by will from the inheritance, nor should the inheritance fall to them diminished in value by the alienation of valuable articles or by debt having been contracted.

(p) Goschen has remarked that it would be more correct to read "obligationisve." As, however, "mancipi u obligationis que" stands in the MS., we must read "mancipi vel obligationis suscipiendæ." The mistake of the "u" resulted in the copyist adding the conjunctive particle "que" to "obligationis." Huschke's *Kritik in loco*.

(q) The "tutela legitima" of patrons and agnate ascendants was established with the principal object of protecting the rights of the tutors, especially their reversionary interests. They could not therefore be compelled to give their sanction to any alienation except under special circumstances; thus their rights of succession were preserved.

193. *Aput peregrinos non similiter, ut aput nos, in tutela sunt feminæ; set tamen plerumque quasi in tutela sunt: ut ecce lex Bithynorum, si quid mulier contrahat, maritum auctorem esse jubet aut filium ejus puberem.*

193. Women are not under the *tutela* with the peregrini as they are with us, but still in general there is something which resembles *tutela* (quasi-tutela); as for example the Bithynian law, which prescribes, that if a woman in any way contracts, either her husband, or her son who is of age shall give his authorization.

194. *Tutela autem liberantur ingenuæ quidem trium liberorum jure, libertinæ vero quattuor, si in patroni liberorumve ejus legitima tutela sint. Nam et ceteræ quæ alterius generis tutores habent, velut Atilianos aut*

194. Free-born women are released from the *tutela* by law if they have borne three children (*trium liberorum jure*), and freed-women who have borne four children are exempted by the *quattuor liberorum jus* if they are

fiduciarios, trium liberorum jure liberantur.

under the *legitima tutela* of a *patron* or his children; but all other women who have tutors of another kind—as for example, tutors *Atiliani* or *fiduciarii*—are free, if they have borne three children.

195. *Potest autem pluribus modis libertina alterius generis habere, velut si a femina manumissa sit: tunc enim e lege Atilia petere debet tutorem, vel in provincia e lege Julia et Titia: (r) nam patronæ tutelam libertorum suorum libertarumve gerere non possunt. Sed et si sit a masculo manumissa, et auctore eo coemptionem fecerit, deinde remancipata et manumissa sit, patronum quidem habere tutorem desinit, incipit autem habere eum tutorem a quo manumissa est, qui fiduciarius dicitur. Item si patronus sive filius ejus in adoptionem se dedit, debet sibi e lege Atilia vel Titia tutorem petere. Similiter ex iisdem legibus petere debet tutorem liberta, si patronus decedit nec ullum virilis sexus liberorum in familia relinquit.*

195. But a freed-woman can have a tutor of another kind in many ways, for example, if she has been manumitted by a woman, for then she must according to the *lex Atilia*, or if in a province according to the *lex Julia et Titia*, request a tutor; since *patronæ* cannot be tutors of their freed-men and freed-women; moreover if she be manumitted by a male and has concluded a *coemptio* under his *auctoritas*, and is thereupon reconveyed and manumitted, she ceases to have her patron as a tutor; but she has for a tutor the man by whom she was emancipated, who is called tutor *fiduciarius*. Again, if her patron or his son has given himself in adoption she must petition for a tutor by virtue of the *lex Atilia* or *Julia*; so also if her patron dies, and has left among the members of his family no male issue, she ought to petition for a tutor in accordance with the same laws.

(r) Lachmann proposes to fill up the lacuna as follows: “*jus non succedi sed auctoritatem dumtaxat suam interponit.*” In this conjecture an idea is presented which appears foreign to that of the author, for a tutor *dativus* did not possess the rights of the *patrona*, which were rights of inheritance and service only—for rights of guardianship the *patrona* had none. The “*auctoritatis interpositio*” is moreover the only right possessed by the tutors of women. Ulp. xi. 25. *Pupillorum pupillarumque tutores et negotia gerunt et*

auctoritatem interponunt; mulierum autem tutores auctoritatem duntaxat interponunt. It appears that there is a mistake in the MS. at *e lege Titia is in*, especially as this law always occurs, certainly elsewhere in Gaius, Ulpianus, and the Institutes, under the name of *lex Julia et Titia*, once only in Theophil. l. 20. sec. 3.—ὁ Ἀτίλιος καὶ ὁ Τίτιος. Theophilus says that the tutor originating from this *lex* was denominated Ἰούλιος Τίτιανός (Ἰουλιοτίτιανός) and clumsily enough he always thus denominated him.

The growth of the empire necessitated the extension to the presidents of the provinces of some portion of the magisterial authority conferred on the *prætor urbanus* in order, as far as possible, to remove the disabilities to which Roman citizens settled in the outlying portions of the empire were subject. See Ortolan's *Instit.* vol. ii. p. 168. Hein. *Elem. Jur. Civ.* p. 75. Ins. pr. de Atil. Tut. (l. 20) Gluck. xxix. sec. 400 et seq. Dirksen *Das Atilische Gesetz* in his *verm. Schriften*, i. No. 1. Walther's *Rechts Gesch.* sec. 122.

Although the marks as they appear in the manuscript for the most part correspond with the received reading, still they are by no means clear; Huschke is of opinion that, judging from internal evidence, we ought to read “(e.l. Jul. et tia n) e lege Julia et Titia; patronæ,” which reading agrees with “*Jure civili et fœminæ tutores esse non possunt.*” Whether, towards the end of the paragraph, “*e lege Atilia vel Titia tutorem petere*” is right, must be left undecided. It might also be read “*e l. Atilia v. Jul. et Titi te.*” See Huschke's *Kritik*, p. 30.

E lege Atilia, etc. The precise date at which this law was passed is not known. Heineccius places it in A.U.C. 443, basing his conjecture on the fact that L. Atilius Regulus was tribune of the people for that year. It is probable that the method of appointing a tutor, which is sanctioned by this *lex*, had its origin at an early period in the history of the state. It would sometimes happen that neither a “*tutor testamentarius*” nor a “*tutor legitimus*” could be appointed; and there thus arose a necessity for an appeal to some

magisterial authority in order to secure the benefits of the tutela. Livy (xxxix. 9) in speaking of a freed-woman at Rome (A.U.C. 557) says that after the death of her patron being no longer *in manus* to any one, she sought a tutor, *a tribunis et prætore*. As the appointment of a tutor was not within the ordinary functions of these magistrates, it appears that the lex Atilia had been passed before the period to which Livy refers. It is now generally held to have been passed in the sixth century, A.U.C., and by its provisions, as already observed, the Prætor urbanus was empowered, with the consent of a majority of the Tribunes of the Plebs, to appoint tutors when it so happened that there could be neither tutores testamentarii nor tutores legitimi. Ulpianus says: “Lex Atilia jubet, mulieribus pupillisve non habentibus tutores dari a prætore et majore parte tribunorum plebis, quos tutores Atilianos appellamus, sed quia lex Atilia Romæ tantum locum habet, lege Julia et Titia prospectum est, ut in provinciis quoque similiter a presidibus earum dentur tutores.” Ulp. tit. xi. 18.

The lex Julia et Titia was enacted under Augustus, A.U.C. 722, and was subsequently amended by the Consul Suffectus, Marcus Titius; so that it was deemed necessary to give the names of both legislators.

196. *Masculi quando puberes esse cœperint, tutela liberantur. (s) Puberem autem Sabinus quidem et Cassius ceterique nostri præceptores eum esse putant qui habitu corporis pubertatem ostendit, hoc est qui generare potest; sed in his qui pubescere non possunt, quales sunt spadones, eam ætatem esse spectandum, cujus ætatis puberes fiunt. Sed diversæ scholæ auctores annis putant pubertatem æstimandam, id est eum puberem esse existimandum, qui XIV annos explevit. (t)*

Just. i. 22. præ.

196. Males are freed from the tutela when they attain the age of puberty. Sabinus, however, Cassius, and other teachers, deemed him to have attained the age of puberty, who by his bodily development, appeared capable of generating; in the case of those who could not attain to man's estate, as eunuchs, one must regard that age at which puberty is usually attained. But the writers of the opposite school think that puberty is to be determined by the years, that is to say, he is to be reckoned to have attained to puberty who has completed fourteen years . . .

(s) The tutela was terminated under the following circumstances: 1. As soon as the pupil attained his majority, or upon his death before that period. 2. If he fell under the *patria potestas*, in which case there was a *capitis deminutio*. 3. If the tutor died, then the next tutor succeeded to the office. 4. If the tutor became incompetent. 5. If he laid down his office on account of some legally recognized ground of excuse. 6. If the mother or the grandmother of the pupil, having acted as a tutor during her widowhood, again entered the bonds of matrimony. 7. If the tutor had been appointed only for a term, or under what was called a *conditio resolutive*, and the period had elapsed or the condition had taken place; “*Ad certum tempus vel ex certo tempore vel sub condicione vel ante heredis institutionem posse dari tutorem non dubitatur.*” Sec. 3. Inst. qui dari tut. (1. 14). 8. If the object were accomplished for the performance of which the tutor had been originally appointed. 9. If the tutor were removed. A tutor might be removed without any action on the part of the pupil; and the co-tutors in the case of a tutor suspectus were bound for their own protection to become parties to the suit. The proceedings for the removal of a tutor suspectus might also be instituted *ex officio*. The accusation “*tutoris suspecti*” could however, only be employed against the tutor during the period of his tutorship. There must be in every case conduct amounting to a clear violation of duty, to sustain such an accusation. If the charges necessary to secure the removal of a tutor were proved, his office was at an end, and the ground of his removal was set forth in his sentence. If he were chargeable with *dolus* or *culpa lata*, the consequence to him was “*infamia*,” and he might be dealt with criminally. By the *lex Julia et Papia*, and in virtue of the enactment relating to the *jus trium liberorum*, women who had borne children were also freed from the tutela.

The tutela, as just observed, was terminated by *capitis deminutio*, but it was only the agnate tutor whose tutorship ceased when the *capitis deminutio* was *minima*. The tutor

testamentarius was permitted “abdicare se a tutela.” The authorities also could remit the tutorship if they pleased, either with or without an application from the tutor. “Tutelas etiam non amittit capitis minutio, exceptis his, quæ in jure alieno personis positæ non deferuntur.” l. 7. pr. Dig. de cap. min. (4. 5.)

The abdication of the “testamentarius” and the transfer “in jure cessio” of the “legitimus muliebris tutor,” like the “tutelæ evitandæ causa facta coemptio,” passed away in the time of Justinian with the abolition of the tutorship of women. Ulp. tit. xi. sec. 28 Ins. quib. mod. tut. finitur (1. 22). Scheurl’s Instit. sec. 168. Boecking’s Instit. pp. 185, 186 ; Moehler Pandek. p. 181.

(t) Gaius in this section follows the opinion of Neratius Priscus. Upon this point Ulpianus says, “Liberantur tutela masculi quidem pubertate: puberem autem Cassiani quidem eum esse dicunt, qui habitu corporis pubes apparet, id est qui generare possit; Proculiani autem eum, qui quattuordecim annos explevit; verum Priscus eum puberem esse, in quem utrumque concurrit, et habitus corporis, et numerus annorum.” Tit. xi. 28. In relation to age it may be observed that in Roman law persons are said to be of full age when they have attained to the age of twenty-five years. Under that age they are minors. Minors are either *puberes* or *impuberes*. As already stated, *impuberes* are placed under the tutela, *puberes* under the cura. An *impubes* is under many disabilities; he could not bind himself by an obligation, nor contract marriage, nor make a will. Boys were *impuberes* until they had attained the age of fourteen: girls till the age of twelve. The period till puberty was called *pupillaris ætas*. *Impuberes* till the age of seven years were called *infantes*. From seven years of age till puberty infants were said to be *infantes majores*, and were either *infantiæ* or *pubertati proximi*, according as they stood nearer to or farther removed from puberty. By the expression “full puberty” (*pubertas plena*), was meant, in males eighteen years, and in females

fourteen years. The State had power to grant what was termed *venia ætatis*, the grace of age, in which case majority might be attained by men at twenty years and by women at eighteen years of age. Till old age, advancing years exercised no special influence in moulding legal relations. But an aged man was released from the duties of guardianship, and also from giving evidence in the courts of justice. Age was of importance in some matters connected with Roman law. Thus, the pater adoptans having attained the *pubertas plena* must be older than the child adopted. If any one bequeathed alimony until puberty, males were entitled to enjoy it till eighteen years of age, and females till fourteen. The *major* only, not the *pubes*, was allowed to alienate immoveables. The *pubes* had however the privilege of the *in integrum restitutio*. An *infans*, so called from inability to speak, was held to have no capacity for business of any kind.

197. *ætatem pervenerit*
in qua res suas tueri possit. *Idem*
apud peregrinas gentes custodiri supe-
rius indicavimus. (*u*)

197. has arrived at that
age in which he can protect his own
property. The same rule is to be
observed among the peregrini as we
have pointed out above.

JUST. i. 23. pr.

(*u*) The fundamental bases upon which the cura rests are either lex or magisterial authority. “Dantur autem curatores ab iisdem magistratibus, a quibus et tutores; sed curator testamento non datur, sed datus confirmatur decreto Prætoris vel Præsidis.” But in the later period of the law legitimi curatores came to be appointed by the magistrates *ex inquisitione*. ss. 1. 3. seq. Instit. de curat. (1. 23.) ll. 1. 13. 16. Dig. de cur. fur. (27. 10.) l. 7. sec. 6. Cod. eod. (5. 70.)

198. Ex iisdem causis et in pro-
vinciis a Præsilibus eorum curatores
dari voluit. (*v*)

198. For the same causes it is
determined that curators are given
in the provinces by their presidents.

(v) *Curatores dari voluit.* Modern jurists employ the word *curatela*, which is not a Roman word, to denote what the Romans expressed by the words *cura* or *curatio*. The principal point to be distinguished between a tutor and a curator is this; the tutor was always associated with a ward in whose *persona* there was supposed to be a legal defect, or gap; the curator with one in whose legal personality there was no such gap to be filled up. Hence the curator exercised no *auctoritas*. His duties consisted simply in *administration* and *consent*. In the ancient Roman law a curator was appointed for insane persons and prodigi, and at a much later period by the *lex Pletoria* for minors.

The *cura* for insane persons was as old as the time of the XII Tables. "Lex est," says Cicero, "si furiosus est, agnatorum gentiliumque in eo pecuniaque ejus potestas esto." *De Invent.* ii. 50. 148. *Tusc. Quæ.* ii. 4.

The law of the XII. Tables had given directions for the *tutela* by testament, but the curator, it is to be observed, was appointed not by testament but by *lex*. In the time of the *lex Atilia* and the *lex Julia et Titia* there was a "*cura dativa*;" and this species of *curatio* occurred more frequently than the older *cura legitima*. Subsequently Marcus Antoninus by an imperial rescript appointed a "*cura testamentaria imperfecta*," so that when the father named a person in his will as curator for his insane child, the magistrate was instructed and empowered to confirm the appointment. There was not at any time a strict *cura testamentaria*. "*Si furioso puberi quamquam majori annis viginti quinque curatorem pater testamento dederit, eum Prætor dare debet secutus patris voluntatem; manet enim ea datio curatoris apud Prætorem, ut Rescripto Divi Marci continetur.*" L. 16. pr. *Dig. qui test. fac. pos.* (27. 10.); l. 7. sec. 5.; *Cod. de cur. furio. vel prod.* (5. 70.); l. 27. *Cod. de episcop. audien.* (1. 4.)

There was, again, a *cura* over prodigals; that is, not over every person who chose to be extravagant in the use of his property, but over every one legally adjudged a spendthrift. This *curatio* also dated back to the time of the XII Tables.

“Curatores aut legitimi sunt, id est qui ex lege duodecim tabularum dantur, aut honorarii, id est qui a Præ tore constituuntur. Lex duodecim tabularum furiosum, itemque *prodigum* cui bonis interdictum est, in curatione jubet esse agnatorum.” Ulp. tit. xii. l. 2.; l. 1. pr. Dig. de cur. furioso (27. 10.) It was not, however, every spendthrift who could be thus restrained. As a rule, the “bonorum interdictio” was only allowable when the prodigal wasted “in riotous living” that which he had received as an inheritance from his father or his grandfather. If he chose to squander property which he had acquired by his own exertions, the State did not interfere. It is interesting to observe that Paulus gives us the exact words in which this interdictio was promulged. He says, “Moribus per Prætorem bonis interdicitur hoc modo : Quando tibi *bona paterna avitaque* nequitia tua disperdis, liberosque tuos ad egestatem perducis, ob eam rem tibi ea re commercioque interdicto.” Recep. Senten. iii. 4. a. sec. 7. Ulpianus also says that the curator was given by the prætor to “ingenuis qui ex testamento parentis hæredes facti male dissipant bona.” See Ulp. tit. xii. sec. 3.

In later Roman law every prodigal was liable to be restrained on the ground of his extravagance ; but the cura legitima, in the strict sense of the term, ceased, and a cura dativa took its place. Such was the law in the time of the classical jurists. Subsequently, if a father had a spendthrift son, he might advert to the fact in his will, and nominate a curator ; and in this way was introduced the cura testamentaria imperfecta. The prætor gave effect to the “patris iudicium” and, without further investigation, ordered the ratification of the curator appointed. See l. 16. Dig. de curat. (27. 10); also l. 9. cod. tit. The latter is an extract from Neratius, whose words, on account of their conciseness and value, are said to be the very pearls of the Digest.

A few remarks are necessary in relation to the lex Pleatoria, already mentioned, as it gave rise to another species of cura, namely that over *minors*. When this lex was passed

is not exactly known, but it is referred to by Plautus in his *Pseudalius*, i. 3. v. 69. He says, "Lex me perdit quina vicenaria, metuunt credere omnes." Again, in the *Rudens* V. iii. 24, "Cedo qui cum habeam judicem, ni dolo malo instipulatus sis, nive etiam dum siem quinque et viginti annos natus." It is probable that this law was passed in the middle of the sixth century of the state, and perhaps not much earlier, as it corresponds in its enactments with the character of the times. The law under consideration is referred to in the *Tabula Heracleensis*, where it is denominated the *lex Pletoria*. *Lineæ* 111, 112. This interesting tablet, to which we are indebted for the name of this law, was found on the Gulf of Tarentum, in the year 1732, broken into two pieces. The first piece discovered was sent to England, and afterwards returned to Naples in 1760, to which city the other fragment had been sent soon after its discovery. The parts were brought together and were found to fit exactly. The first fragment was edited by Maittaire, in 1736. Both pieces were edited by Mazodier, under the title of "*Commentariorum in regii Herculanensis musei æneas tabulas Heracleenses*," part i. ii. Neap. 1754, 1755, fol. The ancient table is composed of bronze, written on one side in Greek, and on the other side in Latin. Since this time Marezoll in 1816, Haubold in 1830, and Savigny in 1838, 1842, 1850, have examined this tablet and published their notes. It contains matter relating to the police, the *decuriones*, magistrates, the census in the Italian cities, also changes in the laws of the cities. Savigny has demonstrated that the name of the law written on this table was the *lex Julia Municipalis*, passed by the emperor in the year 709—a law frequently commented upon by the Roman jurists, and subsequently transferred to the *Digest* under the title "*ad (legem) municipalem* (50. 1)." The discovery of this *tabula* was decisive for the name *lex Pletoria*. It was a law no doubt especially intended for the protection of minors. Persons under twenty-five years of age were, as far as their property was concerned, to be protected; and

any persons who dealt improperly or dishonestly with them were liable to punishment under the provisions of this lex. Any one guilty of fraud upon the estate of a minor was liable to a *judicium publicum*, though the offence was such that, if the person defrauded had been of full age, it would only have afforded matter for a civil action. When a minor needed a curator, after *causæ cognitio*, the prætor appointed one, who was called a "curator dativus." The cura over minors was extended by Marcus Antoninus, who ordained, according to the statement of Capitolinus, that its protection should be extended to all adults, and that no *causæ cognitio* should be necessary. Capitolinus says, "*De curatoribus vero, quum antea non nisi ex lege Pletoria, vel propter lasciviam vel propter dementiam darentur, ita statuit, ut omnes adulti curatores acciperent non redditis causis.*" Capitolin. Marc. c. 10. It was upon this decision of Marcus that the later law was founded. It was not, however, even under the later law every minor that received a curator, but one was appointed to every minor who presented a petition to the prætor for that purpose. In some legal transactions a person who was a minor could not act without a curator. As for instance one who wished to commence an action could act neither as Actor nor Reus—i. e. neither plaintiff nor defendant—without a curator. And so also if a minor wished to alienate his property, he must have a curator *ad hoc* for the purpose of the "*stipulatio*." Ulpianus gives us the form of the edict of the magistrate—"Prætor edicit: Quod eum minore, quam vigintiquinque annis natu gestum esse dicetur, uti quæque res erit, animadvertam.—Apparet minoribus annis vigintiquinque eum opem polliceri; nam post hoc tempus compleri virilem vigorem constat." ll. l. 2. sec. i. Dig. de min. vig. ann. (4.4); The same persons who are tutors of impuberes may become curators of puberes minores by a mere change of office. The person need not be changed, but upon the *auctoritatis interpositio* falling away, the same person may be legally empowered to hold the office of curator. Capitolinus M. Anton. c. 10; Cic. de

nat. Deorum, iii. 30; de officiis, iii. 15. In the two last cited passages the *lex Pletoria* is referred to erroneously as the *lex Latoria*. Priscian, viii. 4. xviii. 19; Walther's *Rechts Gesch.* ss. 529, 530; Scheurl's *Instit.* s. 169; and the article "Curator," by G. Long, in *Dict. Gr. and Rom. Antiq.*, with the authorities there cited.

199. Ne tamen et pupillorum et eorum qui in curatione sunt negotia a tutoribus curatoribusque consumantur aut deminuantur, curat Prætor, ut et tutores et *curatores* eo nomine satisdant.

199. That the means of the pupil, or of the persons under cura, may not be squandered or diminished by the tutors or curators, the Prætor takes care that both tutors and curators shall provide security in this matter.

200. Set hoc non est perpetuum. Nam et tutores testamento dati satisfacere non coguntur, quia fides eorum et diligentia ab ipso testatore probata est; et *curatores* ad quos non e lege curatio pertinet, set *qui* vel a Consule vel a Prætoris vel a Præsidi provincie dantur, plerumque non coguntur satisfacere, scilicet quia satis idonei electi sunt. (*w*)

200. But this rule does not hold universally. For tutors appointed by testament are not compelled to provide security, because their fidelity and care have been approved by the testator himself; and those curators to whom the cura appertains not by mere force of law, but who have been appointed either by the consul, the prætor, or the president of the province, are not usually compelled to give security; since they have been elected as well fitted for the duties of their office.

JUST. i. 24. pr.

(*w*) The remaining portion of the page, about ten lines, is quite illegible.

COMMENTARY THE SECOND.

1. *Superiore commentario de jure personarum* exposuimus; modo videamus de rebus: quæ vel in nostro patrimonio sunt, vel extra nostrum patrimonium habentur. (a)

1. In the former commentary we have set forth the law of persons. Now let us treat of things; these are accounted either in our patrimony or not in our patrimony.

(a) In the Second Book of his Commentaries, Gaius discusses the rights of things, the "*jus quod ad res pertinet*." The Book has three principal divisions.

I. Some things are of divine right, others of human: "*aliæ sunt divini juris, aliæ humani*."

II. Some things are corporal, others incorporal: "*Quædam præterea res corporales sunt, quædam incorporales*."

III. All things are either "*res Mancipi*" or "*res nec Mancipi*."

Under the last division Gaius treats of acquisitions, which are of two kinds. There are *acquisitiones civiles* and *acquisitiones naturales*. In the second principal sub-division of the third head, he treats of the acquisition of an *universitas*, a term to be hereafter explained. This universal acquisition may be by testament or *ex testamento*. In what may be termed an appendix to this book, Gaius discusses legacies (*legata*), fideicommissa, the *differentiæ fideicommissorum et legatorum*, and codicils. Looking at the second book, however, from a less formal point of view, it may be said to treat in general of Things, Possession, Property, and the Law of Inheritance.

The formal division of the book, however, must not be confused with the distinction of Things themselves. Of these there is, as stated under the first head, a two-fold principal division. Hence, Gaius says: "*Summa itaque rerum divisio in duos articulos deducitur: nam aliæ sunt divini juris, aliæ humani.*"

In the first book, Gaius has treated of the law of persons in the technical sense of the term—the "*jura personarum.*" In one sense all law must relate to persons, for if we eliminate the idea of *persona*, it is manifest that there could be no legal relations. The idea of physical personality as already explained (*persona*) is technical in the extreme; and so also is the legal idea of a thing (*res*.) As a great part of Gaius is occupied with the law that relates to *things*, it is well at the outset to fix, as exactly as possible, the idea that the Romans attached to this term. Things, *res*, in the most extensive signification of the term comprise every *ens*, that is, everything which exists. "*Definitionum autem duo sunt genera prima; unum earum rerum, quæ sunt; alterum earum quæ intelliguntur.*" Cic. Top. 5. Everything, "*quæ in rebus humanis est,*" is in this most extensive sense denominated *res*. Ulp. l. 24. pr. Dig. fam. erci. (10. 2) l. 3. Dig. de cond. trit. (13. 3) l. 91. sec. 1. Dig. de verb. sig. (45. 1). In this broad meaning then, every transaction and all *facta* are *res*. Thus a species of obligation known as a *mutuum* is a *real* contract, and the Romans said: "*Re contrahitur obligatio, mutui datione.*" The peculiarity of this real contract was, that the *things* given by the contractor became the absolute property of the contractee, only that he was bound to return *things* of the same kind. "*Mutui autem datio consistit in his rebus, quæ pondere, numero, mensurave constant, quas res in hoc damus, ut fiant accipientis, postea alias recepturi ejusdem generis et qualitatis.*" l. 1. sec. 2. Dig. de oblig. et act. (44. 7). *Res*, however, are usually spoken of as having an existence of a longer or shorter duration and are opposed to *facta*. But the most marked distinction of the term *res* is that it is employed as the very opposite of *persona*.

person is capable of being the subject of a right, a *res* is the mere object of the will of a person. The positive element in the notion of a *thing* is this fitness to become in law the object of the will of a person. What the civilians call a *non ens* could not thus become the *object* of a *jus*.

Not only are *res* the objects of law, but so also are *facta*, and both may be dealt with by means of the stipulatio. Hence, it is said in the Institutes: "Non solum *res* in stipulatum deduci possunt sed etiam *facta*, ut si stipulemur, aliquid fieri, vel non fieri." sec. 6. Instit. de verb. oblig. (3. 16). Strictly speaking *res* are those things which exist in space and have bounds, the same as corporal things. Thus in this exact sense Cicero says: "Esse ea dico, quæ cerni tangive possunt, ut fundus, ædes." Cic. Top. c. 5. When the Romans used the word *res* in what Cicero gives as the second meaning—"alterum earum quæ intelliguntur," they employed the phrase *res incorporales*. Such *res* are in point of fact *jura*. Thus Gaius says: "Quædam præterea *res corporales* sunt, quædam *incorporales*. *Corporales hæc* sunt, quæ tangi possunt, veluti fundus, homo, vestis, argentum, et denique aliæ *res innumerabiles*. *Incorporales* sunt, quæ tangi non possunt, qualia sunt ea quæ *in jure* consistunt, sicut hereditas, usufructus, obligationes quoquo modo contractæ." l. 1. sec. 1. Dig. de divis. rer. et qual. (1. 8) All *jura* belonged to *res incorporales*, as the right of succession, usufructuary rights, and rights arising out of obligations. "Nam ipsum *jus successionis* et ipsum *jus utendi fruendi*, et ipsum *jus obligationis incorporale* est." l. 1. sec. 1. Dig. tit. cit. (1. 8).

All *jura* belong to *res incorporales* with but a single exception. For example, Servitudes, Obligations of all kinds, the Right of Inheritance, etc., are all incorporeal things.

But there is one exception, and it is a notable one deserving of marked attention, and that is the case of "dominium," or "Eigenthum" as the Germans term it, which is the complete legal power of the person to the very substance of the

thing owned. The sources of the Roman Law do not give any definition of dominium *ex professo*, but incidentally in an old imperial rescript it is denominated as an "illibata potestas;" that is, an undiminished potestas. 1. 2. Dig. de his qui sui, etc. (1. 6.) The legal character of this potestas is almost dramatically portrayed in the most ancient process for the recovery of a slave by means of the form of action known as the *vindicatio*, in which process the formal words were: "HUNC EGO HOMINEM EX JURE QUIRITIUM MEUM ESSE AIO." Pagenstecher gives the following definition of dominium: "Das Eigenthum (ist) eine "illibata potestas" des Herrn über seine körperliche Sache." Lehre vom Eig. p. 3. sec. 1. In the Code Napoleon, art. 544, we find the following definition: "La propriété est le droit de *jouir* et de *disposer* des choses de la manière la plus absolue pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements."

Upon reading the French definition one question is suggested, namely, what can be more absolute than the absolute? Property then is the total dominium exercised by the owner over a corporal thing. The dominium, it should be remembered, is as corporal as the thing that is the subject of it, and is not distinguishable from the *res corporalis*, which we may claim as our property. Thus we say, "My property is in that house—or in that garden."

Res, then, as things "qui tangi possunt," it is manifest may be divided into innumerable kinds, but for our present purpose it is only necessary to note the following divisions:

I. *Res in commercio* and *res extra commercium*.

II. *Res mobiles* and *res immobiles*.

III. *Res fungibiles* and *res nec fungibiles*.

IV. *Res consumtibiles* and *res nec consumtibiles*. The Romans did not use these words, but spoke of *res quæ usu consumuntur, vel minuuntur*.

V. Another division arises from the relation of the parts of a thing to the whole: namely, that of *res singulæ* and *universitates rerum*.

VI. There was a further division of *res*, of great importance in ancient law, but one which has ceased to be of importance in our modern jurisprudence, namely, that already referred to, into *res mancipi* and *res nec mancipi*.

The following remarks upon the above divisions must suffice to explain in this place the nature of the distinctions made.

I. *Res in commercio* and *res extra commercium*.

Res are said to be *in commercio*, when they can be dealt with in the way of traffic or commerce, and may thus be held as private property. They are such things as pass freely from hand to hand. When this transfer cannot take place, when a thing cannot become the object of traffic, nor be enjoyed as property by a private owner, it is said to be *res extra commercium*. As a general rule, however, all corporal things are *in commercio*. But there are some things of which this cannot be predicated; and they may be conveniently arranged under three classes:

1. *Res divini juris*. 2. *Res omnium communes*. 3. *Res publicæ*.

1. *Res divini juris* were those things which possessed a special sanctity as being devoted to the gods. Such were *res sacræ* and *loci religiosi*. A *res sacræ* in the later Justinian law was an object dedicated to the Divine Being by some ecclesiastical rite, and intended for His service. In the old Roman law *res sacræ* were things devoted to the *dii majores*. "Sacrae sunt," says Gaius, "quæ dis superis consecratae sunt." (ii. sec. 4.) Justinian, however, says, Christianity having been introduced into the empire, "Sacra sunt, quæ rite et per pontifices Deo consecrata sunt, veluti aedes sacræ, et dona, quæ rite ad ministerium Dei dedicata sunt." Instit. ii. 1. ss. 7—10. Thus a church, or a chapel, or an altar, or a chalice, or gifts and relics consecrated to the worship of God, and hence deemed *sacræ*, could not be the objects of traffic, nor be brought into commercium. Those places were designated *loci religiosi* in which the dead were buried, as cemeteries. But if even a

single corpse were buried in any place, or simply the ashes of a body that had been burned, it made the place *divini juris*, and henceforth it was deemed a *res religiosa*. “*Religiosum locum unusquisque sua voluntate facit, dum mortuum infert in locum suum.*” The inconvenience of this rule of law must have been often felt, as it had the effect of withdrawing from commerce any land in which an owner, for the time being, might have legally interred a deceased person.

In the older law, as we see from Gaius, *res religiosæ* were those things, “*quæ diis manibus relictæ sunt,*” ii. sec. 5; and they are contrasted with the *res sacræ* which were as already stated consecrated “*dis superis.*”

Res sanctæ which, as Gaius expresses it, are “*quodammodo divini juris*” ii. sec. 8, were also *extra commercium*. The greater number of *res sanctæ*, were *res publicæ*. They were on this account withdrawn from commerce, and not because they were *divini juris*. It was not the *sanctitas* alone that made the *res sancta* a *res extra commercium*, but such things were placed *extra commercium* because they belonged to the class of *res publicæ*. If there were any violation of a *res sancta* it was followed as a public offence by a heavier penalty than the violation of a thing *in commercio* owned by a private owner; and herein consisted the *sanctitas*. The city gates and the city walls—“*muri et portæ*”—are mentioned by Gaius as examples of *res sanctæ*. Ulpianus says, “*Proprie dicimus sancta quæ neque sacra, neque profana sunt, sed sanctione quadam confirmata, . . . quod enim sanctione quadam subnixum est, id sanctum est, etsi deo non sit consecratum. Et interdum in sanctionibus adjicitur, ut, qui ibi aliquid commisit, capite puniatur.*” Again, Pomponius says, “*Si quis violaverit muros, capite punitur*” l. 9. sec. 3. l. 11. Dig. de div. rerum et qual. (1. 8). The above are only examples of *res sanctæ*, other things might be mentioned the violation of which brought down upon the offenders a severer punishment.

Res omnium communes. Such things it is obvious by their very nature could not stand in private ownership. Every

person might use and enjoy them, but no one could possess them. There are but four things to be enumerated in the category of *res omnium communes*:—the air, flowing water, the sea, and the sea shore. Marcianus says: “Et quidem naturali jure omnium communia sunt illa: aër, aqua profluens, et mare, et per hoc litora maris.” l. 2. sec. 1. Dig. tit. cit. (l. 8.) When the Romans speak of the air as a *res omnium communis*, they do not mean to include the space above the earth, but only the atmosphere. The man who owns the soil owns the space above it, and this space is a thing *in commercio*; but the atmosphere is a *res extra commercium*. The same remarks, *mutatis mutandis*, apply to running water. The space in which the brook or streamlet flows, as it hastens to feed the larger streams is *in commercio*. It is not, however, all streams that are *res publicæ*. Thus Ulpianus says: “Fluminum quædam publica sunt quædam non; publicum flumen esse Cassius definit, *quod perenne sit*.” l. 1. sec. 3. de fluminib. (43. 12.) A flumen perenne is one “per annum fluens.” Perennial brooks are not as such *res publicæ* although in consequence of their resemblance to public streams, legal protection was afforded to persons having only a private interest in them, which protection was based upon and analogous to that by which waters that were *res publicæ* were protected. There was not at any time in Roman law a strictly legal distinction drawn between the *flumen* and the *ricus*, the broad river and the rill or brook. l. 1. ss. 2, 3, 4. Dig. ne quid. in flum. publ. (43. 13.) Pagenstecher's *Eigenthum* i. pp. 52, 53. Puchta's *Instit.* vol. ii. pp. 326, 327. As a general rule it may be said that the *ricus* is a *res privata*, and that the *flumen* is a *res publica*.

The sea is a third kind of *res omnium communis*. The reason why civilians regard it as a distinct species is, they consider that not only the waves of the sea, the flowing and shifting tides and currents, but the very bed of the ocean itself—the great concave of the deep—to be a thing common to all. The idea of modern international law, that the sea may be

long to a particular people, is quite foreign to the jurisprudence of ancient Rome. *Litora maris* are also *res omnium communes*, that is to say, the sea-shore as high as the water rises at the highest flood tide: "quatenus fluctus hybernus maximus excurrit." Cicero says, "Litus, ita definire, qua fluctus eluderet." Top. 7. Celsus defines the shore as follows: "Litus est, quousque maximus fluctus a mari pervenit." And Javolenus adds to this, "Litus publicum est eatenus, qua maxime fluctus exæstuat; idemque juris est in lacu, nisi totus privatus est." l. 96. pr. l. 112. Dig. de verb. sig. (50. 16).

Res publicæ in the strict sense of the word are those things which are exclusively in the possession of the State. Such are public thoroughfares, public streams, public squares, public baths, and the amphitheatres. With the Romans however, the *viæ* and the *flumina* were especially accounted as *res publicæ*. The public could use the river, for instance, as a ship way, or for fishing, but the ownership itself was vested in the State.

This division of *res* must not however be confounded with *res in patrimonio*, nor with *res extra patrimonium*.

In the cases discussed above, it is rather the possibility of ownership that is the question under consideration; but *res in patrimonio* are those things which are held in private ownership; *res extra patrimonium* those which are not thus held. Hence, in such a division of *res* it is not the *possibility* of ownership that is the object to be regarded, but the *fact* of ownership itself. *Res extra patrimonium* are in this sense the same as *res nullius*. All wild animals when caught are *res in commercio*, but so long as they are unoccupied they are *res extra patrimonium*. And the same remark holds good of other things that might be mentioned. The purest pearls hidden in the deep, and the most brilliant gems concealed in the earth, are *res nullius*, but they are *res in commercio* so soon as they are discovered by the diver or found by the toiling slave.

II. The second division of *res* is that into *res mobiles* and *res immobiles*. This distinction was of little moment so far as it concerned the Law of Inheritance, the Law of Property, and the Law of Contracts which were the same for both species of *res*. In the old German law the division was of much practical value, for the Law of Inheritance was quite different in the two species of property. The student of English law need scarcely be reminded of the great difference that still exists between realty or things that "savour of the realty" and mere personal property.

But the division into *res mobiles* and *res immobiles* was of great importance in Roman law in the case of Prescription and also in that of Servitudes. In the ancient law, as we learn from the XII Tables, the prescription of land, entitling the holder to legal ownership, was for two years, of other things for one year. "*Usus-auctoritas fundi biennium; ceterarum rerum annus esto.*" And at a later period of the law when the time of prescription was extended there was still a wide distinction made between things moveable and immoveable. The possession of moveable things was secured to the *bona fide* possessor after a space of *three years*; but in the case of immoveable things it required a much longer period, namely, ten years *inter præsentes*, that is to say, when the parties between whom there might be a rival ownership dwelt in the same province; and twenty years *inter absentes*, that is to say, when they dwelt in different provinces. Again, the prædial or real Servitudes could only attach to *res immobiles*; and the modified ownership known as Emphyteusis, and also Superficies, appertained to immoveable things. So also certain forms of action could only be employed when the object sought was a *res immobilis*. Such was the case with the Interdict "*Unde vi*" and the Interdict "*Uti possidetis.*"

Under the term immoveable things are to be included both the *prædia rustica* and the *prædia urbana*. The term *prædia urbana* was applied to all buildings in or out of the city of Rome and to plots of land devoted to building pur-

poses. *Prædia rustica* was a term applied to land when it was employed for the raising of any kind of produce. The distinction was one of importance, because it was quite a different servitude and a different mortgage that was required for *prædia urbana* from that needed for *prædia rustica*. Under moveable things must be enumerated "*res esse moventes*," as well as things which may be moved by the owner. Thus, slaves and animals belonged to the former class. Under animals must be included wild animals, tame animals and tamed animals: "*feræ*" "*mansueta*" and "*mansuefacta*." Those brute animals which are not accustomed, so to speak, to live in human fellowship are called "*bestiæ feræ*." By tame animals we are to understand the usual domestic animals. Tamed animals—*mansuefacta*, *i.e.*, tame-made—are quite a distinct species of property from animals denominated tame, and the distinction involves some important legal consequences. If, for example, a wild animal escapes from the custody of its keeper, the owner's dominium is gone, and the animal becomes again a *res nullius*. But when a master has simply missed his dog, he does not lose his dominium, but only his possession. It is not until the *animus revertendi* is gone, that the dominium of the lawful owner is extinguished.

III. A third division is that of *res fungibiles* and *res nec fungibiles*. These terms are not Roman ones, but are of modern invention. For the things now included in these expressions the ancient jurists had no technical name. They described *res fungibiles* as things "*quæ pondere, numero, mensura consistunt*," and consequently *res nec fungibiles* were the opposite, and would be those things which did not consist in weight, number, or measure. Paulus says, "*Mutui datio in his rebus, quæ pondere, numero, mensura consistunt, quoniam earum datione possumus in creditum ire, quia in genere suo functionem recipiunt per solutionem.*" l. 2. s. 1. Dig. de reb. credit. (12. 1). The terms fungible and *nec fungible* were first employed by a jurist in Basel, and originated in a misconception of the passage

just cited. "Quia functionem recipiunt," said Ulrich, of Basel, laying stress on the word "functionem." But the true reading of the passage is "Quia *in genere* suo functionem recipiunt."

IV. *Res consumptibiles* and *nec consumptibiles*. As already noted, the Romans used the phrase "*res quæ usu non consumuntur, nec minuuntur.*" The *res consumptibiles* are things the value of which consists *in the use*. If as the effect of use the thing is consumed, it is technically said to be a *res consumptibilis*. Thus, victuals, corn, wood, money, and many other things which are consumed in the using. If the use of an article does not involve its consumption, it belongs to the category of *res nec consumptibiles*. A garment, for instance, belongs to this class, because, although in the course of time it waxes old and perishes in the using, it is not destroyed by a single act of wearing. It often happens that fungible things and consumptible things are identical, as for example in the case of coined current money. But still these two species of things must not on that account be confounded. It is incorrect to say, as many jurists do, *fungibiles aut consumptibiles*. The distinction between these two kinds of things is a valid one, and rests upon entirely different foundations. If we take a number of copies of a book, of which one copy is as good as another, these books are held to be *res fungibiles* but they are not *res consumptibiles*.

V. Another division of things is that of *res singulæ*, and *universitates rerum*. *Res singulæ* have this characteristic, that they stand in physical coherence. By a *universitas rerum* is to be understood a thing in which the parts are physically separated. These parts, however, by an operation of the mind are regarded as parts of a whole, and by a logical operation are composed into a unit. A number of things, themselves separate and complete, are bracketed, so to speak, together, and are then treated as a single term or expression. Thus, for example, in a flock, or in a herd, or in a library, all the animals or all the books are only con-

sidered as parts of a whole. The Romans called such things, “universitates rerum distantium.” *Res singulæ*, on the other hand, were either *res unitæ* or *res compositæ*. *Res unitæ* were those things which consisted of organic parts. But when the unity arose by means of mechanical skill, or by art, such things were said to be *res compositæ*. Thus a tree or a sheep was said to be a *res unita*, whilst a house or a shop was denominated a *res composita*. In treating of this division the continental jurists say that the Romans employed a trichotomy, inasmuch as they used as a test the three following considerations. Did the thing result from organisation; or was it the result of mechanical or artistic skill; or was it simply a creature of the intellect or reason—i.e. a logical conception?

In regard to the “*universitas rerum*” there can be no general rule laid down; nor can a catalogue be given by means of which to judge whether a “*universitas rerum*” is to be regarded as a totality, or whether we are to regard the *singula corpora* of which the *universitas* may be composed. Circumstances alone can decide this. A herd may be regarded as a whole, or we may consider the several heads of cattle of which it consists. But although a grazier might sell the herd for a certain sum of money, by legal implication it was held that he sold the several head of cattle which constituted the herd. And so also in what is called *possessio*, a man could not possess the herd as a whole, but his possession, like the sale, was of the several heads. If a man, however, bought the herd *as a herd*, and there chanced to be a sick animal, he could not use the *actio* given by the *ædiles* for his protection from loss.

VI. The last division of things to be noted is that of “*res Mancipi* and *res nec Mancipi*.” For this see the note to Gai. i. 120. pp. 116. 117.

2. Summa itaque rerum divisio in duos articulos deducitur: nam aliæ sunt divini juris, aliæ humani.

2. Therefore the principal division of things is into two classes; for some are of divine, others of human right.

3. *Divini juris sunt veluti res sacræ et religiosæ.*

3. *Res sacræ* and *res religiosæ* are as it were of divine right.

4. *Sacræ sunt quæ Diis superis consecratæ sunt; (b) religiosæ, quæ Diis manibus relictæ sunt.*

4. *Res Sacræ* are those things which are consecrated to the gods of the upper world; *res religiosæ*, those which are dedicated to the gods of the lower world.

JUST. ii. 1. 8.

(b) *Sacræ sunt, etc.* The same things may sometimes be both *sacra* and *religiosa*. But there are certain things of which only one of these terms can be predicated. A pecunia may be both *sacra* and *religiosa*; but a sepulchre was always regarded as a *res religiosa*. Every spot became a *locus religiosus*, when by permission a corpse was buried in it. It was not the owner alone who must be consulted, but all the parties having an interest in the estate, as, for example, the person, whoever he might be, entitled to the usufruct. A consequence of this principle was that, as Gaius says, in the provinces, according to the opinion of most jurists, there could not be strictly speaking a *locus religiosus*, for in provincial land the reputed owner had only the possession and usufruct, whilst the dominium was either with the Roman people or with the emperor, according as the land was "*prædia stipendaria* or *tributaria*." Hence if a place in any of the provinces were to be made *religiosus*, it was necessary to obtain the consent of the *populus* or of the emperor. Under these circumstances, according to Gaius (ii 7), a place of interment in the provinces might be regarded "*pro religioso*." In analogy with this, a consecrated place in a province, which was not really "*sacer*" might be regarded as "*pro sacro*."

To attempt to make a place *religiosus* without the consent of the parties interested, rendered the person so doing liable to a penalty. We possess the edict of the Prætor on this point. "*Prætor ait: SIVE HOMO MORTUUS, OSSAVE HOMINIS*

MORTUI IN LOCUM PURUM ALTERIUS, AUT IN ID SEPULCHRUM, IN QUO JUS NON FUERIT, ILLATA ESSE DICENTUR, QUI HOC FECIT, IN FACTUM ACTIONE TENETUR, ET PENA PECUNIARIA SUBJICIETUR." 1. 2. sec. Dig. de relig. etc. (11. 7). Every boundary wall was not sanctum, but the city wall as reared for the defence of the people is especially mentioned as such. Hence, Festus says: "Sacrum est, quod Deo consecratum est, sanctum ut murus, qui circa oppidum est, religiosum, ut sepulchrum, ubi corpus humatum est." See Gans Schol. pp. 228. 229. 1. 1. Dig. ad leg. Jul. Pecul. (48. 13) 1. 2. ss. 2, 3, 7. Dig. de religiosis (11. 7).

5. *Sed sacrum quidem solum existimatur auctoritate populi Romani fieri; consecratur enim lege de ea res lata aut senatusconsulto facto.*

5. But a spot is accounted sacred (sacer) on the authority of the Roman people; either by the passing of a lex consecrating it, or by a senatusconsultum.

6. Religiosum vero nostra voluntate facimus mortuum inferentes in locum nostrum, si modo ejus mortui funus ad nos pertineat.

6. But on the other hand we may make our private ground *religiosus* of our own free will by interring a dead body therein, provided only the burial of the deceased be incumbent on us.

JUST. II. 1. 9.

7. Set in provinciali solo placet plerisque solum religiosum non fieri, quia in eo solo dominium populi Romani est vel Cæsaris, (c) nos autem possessionem tantum et usumfructum habere videmur. Utique tamen ejusmodi locus, licet non sit religiosus, pro religioso habetur, quia etiam quod in provinciis non ex auctoritate populi Romani consecratum est, proprie sacrum non est, tamen pro sacro habetur.

7. But in a province, according to the view of most persons, we cannot make the land *religiosus*, since the *dominium* of that land is in the Roman people or in the Emperor, and we appear to have only the mere possession and usufruct. Still, although a place of this kind is not made *religiosus*, it is treated as *religiosus*; just as whatever in the provinces is not consecrated by the authority of the Roman people, is not properly sacred, yet it is accounted as sacred.

JUST. II. 1. 9.

(c) The Roman Empire was composed of three constituent parts—Rome, Italy, and the Provinces. Rome was the centre and, so to speak, the soul of the empire. The imperial city represented and mirrored the entire State. All the actual citizens were citizens of the city of Rome, hence Modestinus says, “*Roma communis nostra patria est.*” l. 33. Dig. ad munic. (50. 1.) Italy was preferred to the provinces, for the Italian soil might be held in Quiritarian ownership. It was also relieved from the tax on land and from the capital tax, and the Italian cities had to a certain extent the right of self-government. The provinces, however, were entirely subjected to the dominium of the Roman State. The terms “*stipendiaria*” and “*tributaria*” were applied to possessions situated in the provinces, and denoted an important limitation in the ownership of the land. “*Stipendium a stipe appellatum est, quod per stipes, id est modica æra colligatur. Idem hoc etiam tributum appellari, Pomponius ait. Et sane appellatur ab intributione tributum, vel ex eo, quod militibus tribuatur.*” l. 27. sec. 1. Dig. de verb. sig. (50. 16.) When the imperial power was established under Augustus, a great change took place in the administration of the provinces. Where a large military force was required to preserve order and maintain the government, Augustus took charge of the provinces himself. Where this was not the case, the provinces were left to the care of the senate and the Roman people. Strabo. 17. p. 840. Hence we find Gaius making the division of the provinces into those which were “*proprie Populi Romani*” and those which were “*proprie Cæsaris.*” Theophilus, in his account of this, says, “The reason for this naming of the provinces arose in the following manner: The old Roman Emperor (Augustus) ruled the whole earth, and being admired by the Romans on account of his great bravery, divided the provinces and held some for himself and gave others to the people. The provinces of the populus were called ‘*stipendiariæ*,’ as being subject to the payment of a fixed money tribute, called the ‘*stipen-*

dium.'” It was thus named from *stipes*—money collected, and *pendo*, because originally at Rome money was paid by weight and not by tale. It has been thought that the condition of the *urbes stipendiariæ* was more honourable than that of the *vectigales*. Theophilus says that these provincials brought not only contributions in gold, but in other things, to be enjoyed for the benefit and pleasure of the *populus*, and that on this account they were called *stipendiaria*, a term applied not only to the people, but also to their dwellings and land. The provinces of Cæsar were called *tributariæ* on account of the severe taxes placed upon them by the emperor, which were rendered necessary by the cost incurred in the maintenance of his army. Those who by favour of the emperor or the *populus* held lands in this manner, had no real ownership, that is to say, they had no *dominium*, for the *dominium* was either with the *populus* or in the emperor. They had, however, the *Usus* and the *Fructus* and the most complete possession, which they could transfer to another or devise to an heir. In the case of Italian lands and buildings, and those places which had obtained the Italian *jus*, the owners had the *dominium*. The provincials might lose the enjoyment of their lands, as we learn from the *Vaticana Fragmenta*, if they neglected to pay the imposts. “*Amitti autem usumfructum capitis minutione constat; nec solum usumfructum, sed etiam actionem de usufructu, velut si is ex stipulatu debeatur vel per fideicommissum legatumve per damnationem datus sit. Et parvi refert, utrum jure sit constitutus usufructus, an vero tuitione prætoris: proinde licet in fundo stipendiario vel tributario, item in fundo vectigali vel superficie non sit jure constitutus, capitis minutione amittitur; nam ex persona fructuarii capitis minutio extinguit usumfructum.*” *Vat. Frag. 61.*

In the time of Justinian, and by a constitution of that emperor, the distinction between *stipendiaria* and *tributaria* provinces was abolished. So that the moment the owner conveyed his land either as a gift or in exchange there was

a complete transfer not only of the possession and the usufruct, but of the dominium. Theoph. lib. ii. tit. 1. sec. 40. Puchta's Instit. vol. i. p. 392.

8. Sanctæ quoque res, velut muri et portæ, quodammodo divini juris sunt.

8. Also *res sanctæ*, such as walls and gates, are in a certain manner subjects of divine law—*divini juris*.

9. Quod autem divini juris est, id nullius in bonis est: id vero quod humani juris est plerumque alicujus in bonis est: potest autem et nullius in bonis esse. Nam res hereditariæ, antequam aliquis heres existat, nullius in bonis sunt.

9. That which is subject to divine law is not the property of any one: but on the other hand that which is subject to human law is generally the property of some one, though it also may be the property of no one; for things capable of being inherited, are *res nullius* before any one is declared heir.

JUST. II. 1. 7.

10. Hæ autem res quæ humani juris sunt aut publicæ sunt aut private.

10. But those things which are the subjects of human law are either public or private.

11. Quæ publicæ sunt, nullius in bonis esse creduntur; ipsius enim universitatis esse creduntur. Private autem sunt, quæ singulorum sunt.

11. Those which are public are deemed to be *res nullius*, for they are considered as belonging to all as a body. But private things are the property of particular owners.

12. Quædam præterea res corporales sunt, quædam incorporales.

12. Moreover, some things are corporal, others incorporeal.

13. Corporales hæc sunt quæ tangi possunt, veluti fundus, homo, vestis, aurum, argentum et denique aliæ res innumerabiles.

13. Those things are called corporal which may be touched, as land, a slave, a garment, gold, silver, and, in short, innumerable other such things.

14. Incorporales sunt quæ tangi non possunt: qualia sunt ea quæ in jure consistunt, sicut hereditas, usufructus,

14. But those things are incorporeal which cannot be touched, such as those which are the creatures of

Nec ad rem pertinet, quod in hereditate res corporales continentur; nam et fructus (d) qui ex fundo percipiuntur corporales sunt, et id quod ex aliqua obligatione nobis debetur plerumque corporale est, veluti fundus, homo, pecunia: nam ipsum jus successionis, et ipsum jus utendi fruendi, et ipsum jus obligationis incorporale est. Eodem numero sunt et jura prædiorum urbanorum et rusticorum, quæ etiam servitutes vocantur.

law, for example, hereditas and usufructus. Nor does it affect the matter that things corporal are contained in an inheritance; for fruits gathered from a farm are corporal things; and that to which we are entitled by virtue of an obligation is generally a corporal thing, as a field, a slave, or money; while the right of succession, the right of usufruct, and the right itself of obligation, are incorporal. In the same enumeration are the rights over real estates (*jura prædiorum*), both urban and rural; these are also called servitudes.

[Almost thirteen lines are deficient at the end of this section. They are supposed to have related to servitudes. These lines are supplied from the Epitome of Gaius, a work in existence before the discovery of his Institutes, and read as follows: "*Incorporalia etiam sunt jura prædiorum urbanorum vel rusticorum. Prædiorum urbanorum jura sunt stillicidia, fenestræ, cloacæ, altius erigendæ domus, aut non erigendæ, et luminum, ut ita quis fabricet, ut vicinæ domui lumen non tollat. Prædiorum vero rusticorum jura sunt via, vel iter, per quod pecus aut animalia debeant ambulare vel ad aquam duci, et aquæductus: quæ similiter incorporalia sunt. Hæc jura tam rusticorum quam urbanorum prædiorum servitutes appellantur.*" Gai. Epit. ii. 1. sec. 3. For an account of the nature and law of servitudes see the note to Gai. ii. 29.]

(d) *Fructus* in the exact sense of the term are the organic products of a thing; the *partus ancillæ* were not reckoned by the Romans among fruits, but among accessions. Again the term *fructus* is applied in a subordinate sense to other returns, and profits derived from a thing; as for example, the interest upon money lent. The last mentioned are called *fructus civiles*, the former *fructus naturales*. Thus, one who uses his land himself derives from it the *fructus naturales*,

whilst he who lets it, and receives an equivalent in rent, obtains the *fructus civiles*. *Fructus naturales* may be simply the products of unaided nature, and in this case they are denominated *fructus naturales* in the limited and strict sense. If the fruits were obtained by means of human activity and toil, they were then denominated *fructus industriales*. In relation to fruits the following distinctions have been made: *Fructus pendentes* or *stantes* are those fruits which remain united with the thing which produces them. *Fructus separati* are the fruits when separated. *Fructus percepti* are those fruits obtained by the tenant or usufructuary by virtue of his right derived from the proprietors; they are the fruits gathered by the person in lawful possession. The *perceptio* of the fruit is of importance in relation to the acquisition of an estate, and in the “*remissio mercedis*.” *Fructus percipiendi* was the term applied to those fruits which might have been gathered, but which had not been. They have been called “neglected fruits,” and came into consideration particularly when any one had been in unlawful possession of a *res frugifera*, and was afterwards sued as a *mala fide* possessor by an *actio in rem*. Such a possessor was bound to give compensation not only for the fruits actually enjoyed, but also for such as he might have obtained by the highest degree of industry, or such as the plaintiff would have obtained if his property had not been withheld. The amount of the damages to which the owner was entitled was regulated by the maxim, “*Fructus non intelliguntur, nisi deductis impensis*.” That is to say, the expense of raising and gathering must be deducted from the entire value of the fruits. *Fructus exstantes* were those fruits which the possessor had still in hand—unconsumed fruits. *Fructus consumti* are those which the possessor had either destroyed, used, or sold. The *bona fide* possessor was only answerable for *fructus exstantes* from the time of the *litis-contestatio*, but the *mala fide* possessor was answerable for the whole. Mackeldey Mod. Civ. Law, pp. 156, 157. Moehler, pp. 22, 23. Savigny Besitz, sec. 22. a.

15. Item omnes res aut mancipi sunt aut nec mancipi, mancipi sunt prædia in Italico solo, tam rustica, qualis est fundus, quam urbana, qualis domus;—item jura prædiorum rusticorum, velut via, iter actus, aqueductus; item servi et quadrupedes quæ dorso colloque domantur, velut boves, muli, equi, asini. (e) Ea autem animalia nostri quidem præceptores statim ut nata sunt mancipi esse putant: Nerva vero, (f) Proculus et ceteri diversæ scholæ auctores non aliter ea mancipi esse putant, quam si domita sunt; et si propter nimiam feritatem domari non possunt, tunc videri mancipi esse, cum ad eam ætatem pervenerint, cujus ætatis domari solent.

15. Again all things (res) are either *res mancipi* or *res nec mancipi*. *Res mancipi* are—real estates on the Italian soil, both rural, as a farm, and urban, as a house—also rights pertaining to rural estates, such as the various rights of way (*via iter actus*) and watercourses (*aquæ-ductus*),—also slaves and those quadrupeds which are tamed by means of the yoke and bridle, as for example, oxen, mules, horses, and asses But our instructors class these creatures as *res mancipi* from the time of their very birth. On the other hand Nerva, Proculus, and the writers of the opposite school, regard them as *res mancipi* only when they are tamed; and if they are untameable on account of their great ferocity, then they appear to be regarded as *res mancipi*, when they have attained that age at which animals may be usually tamed.

(e) The first part of this section, ending with the word “*asini*,” is inserted in the text from Ulp. tit. xix. 1. For the distinction between *via*, *iter* and *actus*, see note on Gai. ii. 29, also Just. ii. 3. de servitutibus.

(f) There were two distinguished jurists, father and son, of the name of Nerva. The father, Marcus Cocceius Nerva, is here referred to. He was contemporary with Sabinus and belonged to the school of Labeo and Proculus. He served as Consul A.D. 22. Filled with despair at his own condition and that of the state, he determined to commit suicide, which resolve he carried into effect. See Tac. Ann. vi. 26. Dio. Cas. 58. 21. Instit. Rom. Law. p. 119. Sempronius Proculus gave his name to the school of Labeo. For the distinctions between the schools see the Introduction to this work. pp. 11—14.

16 *Ex diverso bestiae nec mancipi sunt, velut ursi, leones, item ea animalia quæ fere bestiarum numero sunt, velut elephantes et cameli; te ideo ad rem non pertinet, quod hæc animalia etiam collo dorsove domantur quorum mancipi esse; quædam non mancipi sunt.*

17. *Item fere omnia quæ incorporalia sunt nec mancipi sunt, exceptis servitutibus prædiorum rusticorum in Italico solo, (g) quæ mancipi sunt, quamvis sint ex numero rerum incorporalium.*

(g) This is Huschke's reading, and is in strict accordance with the marks in the MS.: "Exceptis servitutibus prædiorum rusticorum in Italico solo, q. mcipi. sunt.

18. *Magna autem differentia est mancipi rerum et nec mancipi.*

19. *Nam res nec mancipi nuda traditione alienari possunt, si modo corporales sunt et ob id recipiunt traditionem.*

20. *Itaque si tibi vestem vel aurum vel argentum tradidero, sive ex venditionis causa sive ex donationis sive quavis alia ex causa tua fit ea res sine ulla juris solemnitate.*

21. *In eadem causa sunt provincialia prædia, quorum alia stipendiaria, alia tributaria vocamus. Stipendiaria sunt ea quæ in his provinciis sunt, quæ propriæ populi Romani esse intelleguntur. Tributaria sunt ea quæ in his provinciis sunt, quæ propriæ Cæsaris esse creduntur.*

16. On the other hand, wild beasts, such as bears and lions, are among *res nec mancipi*; as also those animals which are commonly accounted wild beasts, as elephants and camels; nor does it affect this statement that these animals are tamed also by the yoke and bridle are mancipi, some are nec mancipi.

17. Almost all incorporal things are *res nec mancipi*, with the exception of prædial servitudes in the Italian soil, for these are still *res mancipi* although belonging to incorporal things.

18. There is a great difference between *res mancipi* and *nec mancipi*.

19. For *res nec mancipi* can be alienated by mere delivery, if only they be corporal, and therefore capable of delivery.

20. Therefore if I have delivered to you a garment, or gold or silver, whether it be on the ground of a sale, as a present, or for any other reason, that thing becomes yours without any further formality.

21. It is the same with provincial real estates, of which some are called *stipendiaria*, others *tributaria*; *Stipendiaria* denotes real estates in those provinces which are regarded as the peculiar property of the Roman people; *tributaria* the estates in those provinces, which are considered to belong to the emperor.

22. Mancipi vero res *æque* (h) per mancipationem ad alium transferuntur; unde *scilicet* mancipi res sunt dictæ. Quod autem valet mancipatio, *idem valet et in jure cessio*.

22. But *res mancipi* are those things, transferred to another, likewise by mancipation, whence also they are called *res mancipi*. Moreover the transfer *in jure cessio* has the same effect as mancipation.

(h) Boecking's reading, "sunt quæ," instead of "æque," would be correct if Gaius had here intended to explain what things are *res mancipi*. He has previously, however, spoken upon that subject. In this place he distinguishes between *res mancipi* and *res nec mancipi* with especial reference to the different modes by which they may be alienated. He has just before in ii. 19. said of the *res nec mancipi* "unde traditione alienari (certainly not abalienari) possunt," or, as Huschke would more correctly read, "ad alium transferunt." Huschke thinks that Gaius wrote here, "Mancipi vero res *æque* per mancipationem ad alium transferuntur," and that the copyist had written "equæ." *Æque*, in Gaius, always signifies *likewise* (see for example i. 68. ii. 143. 144. iii. 41.) The *res nec mancipi* were transferred by means of tradition. For mancipation and tradition stand related to one another in the same manner as the different natures of the two kinds of things correspond to each other, and their modes of transfer are hereafter contrasted with each other. It cannot be said that the *res mancipi* can be alienated by means only of mancipation, and the *res nec mancipi* only by means of tradition, for certainly there are many other modes of alienation common to both. Hence, Boethius expresses himself without consideration in Top. lib. iii. p. 322. 13. Orell. "Quæcunque igitur res lege duodecim tabularum aliter nisi per hanc solemnitate[m] abalienari non poterat. Sui juris autem ceteræ nec mancipi vocabuntur." This corrupt text appears to have arisen from "non poterat, mepi. r. (mancipi res) erat (of which *ut* has been wrongly taken for the sign of 'autem') ceteræ nec mancipi vocabuntur." Boeth. ad Top. c. 5. sec. 28.

23. *Et mancipatio quidem quemadmodum fiat, superiore commentario tradidimus.*

23. In what manner mancipation is effected we have already explained in our former commentary.

24. In jure cessio autem hoc modo fit. Aput magistratum populi Romani, velut Prætozem, vel aput Præsides provinciæ is cui res in jure ceditur, rem tenens ita dicit: HUNC EGO HOMINEM EX JURE QUIRITIUM MEUM ESSE AIO. Deinde postquam hic vindicaverit, Prætor interrogat eum qui cedit, an contra vindicet. Quo negante aut tacente, tunc ei qui vindicaverit eam rem addicit. Idque legis actio vocatur, quæ fieri potest etiam in provinciis aput Præsides earum. (i)

24. Legal transfer, *in jure cessio*, takes place in the following manner: he to whom the thing is ceded *in jure*, holding the thing to be ceded in his hand in the presence of a magistrate of the Roman people, as the prætor, or the president of a province, speaks thus:—"I affirm that this slave is mine by Quiritarian law (*ex jure quirittium*)."

After he has made this claim, the prætor asks the man who is surrendering his rights, whether he maintains an opposing claim, and upon his denial or silence, then the prætor adjudges the thing to the party who has claimed it; and this is called a *legis actio*. The same result may also be accomplished in the provinces before the presidents.

(i) The *in jure cessio* was one of the most ancient of Roman institutions, or modes for the conveyance of property from one person to another. It was a form, as we learn from Paulus, as old as the time of the Twelve Tables. The text gives us the ceremony employed, and will remind the student of English law of the now abolished method of conveyance by fine and recovery. The question, it appears, had been raised in the time of Paulus, whether a *mancipatio* or an *in jure cessio* could be *ex tempore* or *ad tempus*, and *ex condicione* or *ad condicionem*. Pomponius thought that neither could take place *ad certum tempus*. Paulus says, 'Ego didici et deduci ad tempus posse; quia et mancipationem et in jure cessionem leges lege XII tabularum confirmantur.' Vat. Frag. sec. 50. In the most ancient times of Rome all acquisitions were probably made through the intervention of the State. The Roman soldier had his

share allotted to him of the moveables gained as plunder from the enemy; whilst, in the case of immoveables, he obtained his property and his title by assignment from the Government, or by purchase from the quæstor. As soon as it became needful to transfer valuable property from one person to another, it was quite in accordance with the spirit of ancient law to endeavour to make such transfer by means of the aid and under the sanction of the State. To do this, recourse was had to the legal forms employed in the *vindicatio*. Such appears to have been the origin of the *in jure cessio*. As Ulpianus informs us, there were three parties necessary to this fictitious suit. The *dominus*, who yielded by *cessio*; the man who made the fictitious *vindicatio*; and the representative of the State in the person of the prætor, in whose presence the *cessio* must take place. Ulpianus says, “In jure cessio quoque communis alienatio est et Mancipi rerum et nec Mancipi. Quæ fit per tres personas, in jure cedentis vindicantis, addicentis: in jure cedit dominus; vindicat is, cui ceditur; addicit prætor.” Ulp. tit. xix. 9. 10. The proceeding was the ancient form of action known as the “*legis actio*.” The person to whom the property was to be conveyed, although having at the time no legal right to it, claimed it as though it were his own. This was done, as Ulpianus informs us, in the presence of the prætor and of the actual owner. The judge called upon the real *dominus* for his defence, when, upon his declaring that he had none to make, or upon his remaining silent, the prætor adjudged the thing to the feigned owner. The name for this conveyance implies the surrender of the thing on the part of the *dominus*. “*Cessio est propriæ rei concessio—nam aliena restituimus, non cedimus, nam cedere propriæ dicitur, qui contra veritatem alicui consentit.*” This form was available for the transfer of every species of property from one person to another—of *res incorporales*, usufructus, hereditates, the tutela legitima libertæ, etc. Ulp. tit. cit. s. 11. “*Res autem corporales,*” adds also Ulpianus, “*quasi singulæ in jure cessæ essent, transeunt ad eum,*

cui cessa est hereditas." s. 15. ib. Already, in the time of Gaius, as we see by the next section, this mode of conveyance was falling into disuse; and it is not at all likely that when a more simple and easy means of transfer was provided, this formal and artificial method would be any longer employed. It had been superseded entirely in the time of Justinian. Puchta's Instit. vol. ii. p. 641; Marezoll's Instit. p. 211.

25. *Plerumque tamen et fere semper mancipationibus utimur. Quod enim ipsi per nos præsentibus amicis agere possumus, hoc non est necesse cum majore difficultate apud Prætores aut apud Præsides provinciarum quaerere.*

25. Yet generally, and indeed almost always, we resort to mancipation; for it is not necessary to have recourse to the prætor, or to the president of a province, in order to accomplish with greater difficulty that which we can do in the presence of our friends.

26. *At si neque mancipata, neque in jure cessa sit res Mancipi . . . (j)*

26. But if a *res Mancipi* has been neither mancipated nor ceded in *jure*

(j) In the Veronese MS. the page which follows (cxvi a) is quite illegible. In the following page, of the first seven lines a very few words can be read. Huschke is of opinion that in the lost page, and in the commencement of the following, Gaius had affirmed that when a *res Mancipi* was conveyed by *traditio*, the person accepting it failed to obtain the Quiritarian ownership, and held it only *in bonis*. See Gai. ii. sec. 41. See note 17 to Huschke's Gaius on the section under consideration. For the distinction between Quiritarian ownership and ownership *in bonis*, see the note on Gai. ii. sec. 40.

27. *In summa admonendi sumus nexum Italici soli proprium esse, provincialis soli nexum non esse; recipit enim nexum significationem solum non aliter, quam si Mancipi est, provinciale vero nec Mancipi est . . . enim vero provincia de Mancipa . . . (k)*

27. In general we ought to observe that *nexum* is a right peculiar to the Italian soil. There is no *nexum* of the provincial soil; for the soil only admits the application of *nexum* when it is a *res Mancipi*, but the provincial soil is *res nec Mancipi*.

(h) *Nexum*, about which there is a good deal of obscurity, was essentially an institution or a contract peculiar to the old Roman law. 1st. In the most extensive signification of the word, *nexum* was a term applied to every transaction "per æs et libram." "Quodcunque per æs et libram geritur—idque necti dicitur, quo in genere sunt hæc; testamenti factio, nexi dando, nexi liberando." Thus the "mancipatio per æs et libram" was a *nexum*, and so also was the making of a testament, *testamenti factio*. When a legal transaction in the ancient Roman law was effected by the weighing out of copper in the presence of an emptor, a *libripens*, and five Roman citizens as witnesses, the term *nexum* was technically applied to such a proceeding. In the strict sense, however, this word had a less extensive meaning, and was applied to those proceedings which had for their special object the creation of an obligation. *Nexum æs* was "pecunia quæ per nexum obligatur." Varro says, "quod obligatur per libram, neque suum sit inde nexum dicitur. Liber qui suas operas in servitutem pro pecunia quam debeat dat, dum solveret, nexus vocatur, ut ab ære obærat." Varro de ling. Lat. vi. 5. Mucius Scaevola defined *nexum* as "Quæ per æs et libram fiant ut obligentur, præter quæ mancipio dentur." See Festus sub voce "Nexum." 2nd. The nexual contract "per æs et libram" was originally in the form of a *mutuum*, in which a quantity of a fungible thing was received as a loan, under the obligation to return to the lender the same quantity of the same kind of thing, and of equally good quality. "Mutuum damus recepturi non eandem speciem, quam dedimus sed idem genus." l. 2. pr. Dig. de rebus cred. (12. 1.) At the time referred to, the scales and copper were not merely symbolic; but, as there existed no coined money, they were employed, the copper as the price, and the balance for the purpose of weighing it out. This was the meaning of the contract "per æs et libram;" so much copper was weighed out as the price, or rather for the loan. Not only could a *mutuum* be thus constituted, but every debt and obligation might be conclu-

ded in a similar manner, by means of the *nexum*; and even if there were no debt, when a person chose to bind himself by a *nexum*, the ground, or reason of the obligation was not inquired into, but only the fact of the *nexum*, which was regarded as a strictly civil obligation. It was thus a formal obligation limited originally to a pecuniary debt, either an actual *mutuum*, or a symbolic one entered into, as we express it, *dicis causa*. 3rd. In important connection with the *nexum*, there came into operation the following law of the Twelve Tables: “Cum *nexum* faciet *mancipiumque*, uti *lingua nuncupassit*, ita *jus esto*.” See Cic. de offic. iii. 16. sec. 65. The meaning of this law seems to be, that all accessory agreements, or, as they are now termed, *leges nexæ*, had as full legal force or effect as the *nexum* itself. There was a *lex nexa*, to which attention should be paid; it provided that if a debtor did not discharge the debt for which he was liable under a *nexal* obligation at the time it became due, his creditor should have the right to arrest him, and to hold him in slavery until such time as the debt was paid. It was, so to speak, a strict and severe form of execution, which empowered the creditor, if he pleased, to reduce his debtor to the most abject and wretched of all conditions. The debtor was thus called a *nexus*, and the transaction itself was denominated a *nexum*. Mr. Long, Dict. Gr. & Rom. Ant. “Nexum,” has quoted a curious passage from Aulus Gellius explaining the ancient mode of procedure under the provisions of the Twelve Tables. If the debtor admitted the debt, or had been condemned in the amount of the debt by a *judex*, he had thirty days allowed him for payment. At the expiration of this time he was liable to the *manus injectio* and ultimately to be assigned over (*addictus*) to his creditor by the sentence of the *prætor*. The creditor was required to keep him for sixty days in chains, during which time he publicly exposed the debtor on three *nundinæ* and proclaimed the amount of his debt. If no person released the prisoner by paying the debt, the creditor might sell him as a slave or even put him to death. If

there were several creditors, the letter of the law allowed them to cut the debtor in pieces, and to take their share of his body in proportion to their debt. Gellius says that there was no instance of a creditor ever having adopted this extreme mode of satisfying his debt. But the creditor might treat the debtor who was *addictus* as a slave, and compel him to work out his debt. There was one striking peculiarity in regard to *nexum*, namely, that if the *nexus* were in the above way reduced to slavery, he did not fall into misfortune alone, but his children and his grandchildren, if they were under his potestas, or those who were held by him in manus, were reduced with the *nexus* to his forlorn condition. Hence, it was a most oppressive and terrible power that the creditor possessed. Niebuhr has fallen into great mistakes in relation to the *nexum*. He supposed that it referred to those debtors who had sold themselves into slavery by means of the form known as *mancipatio* in order to satisfy the unreasonable clamours of their creditors. But such a self-mancipation was impossible. What really took place was this: in connexion with the nexual obligation there was an accessory agreement, a *lex nexa*, out of which slavery, in point of fact, might, and possibly did, in some instances arise. It was manifest that such an institution could not continue among a free people like the Romans, and hence in the year 429 A.U.C. a popular law was introduced and passed called the *lex Poetilia*, the effect of which was that any *lex nexa* by which the person should be endangered was declared to be unlawful. The consequence was that the possibility of a free man falling into slavery by such an accessory agreement was at once and for ever avoided. The effect of this law was not to touch the institution of *nexum* itself, so that this mode of contracting “*per æs et libram*” still continued to exist. Heineccius says, “C. Poetelio L. Papirio Coss. ne quis, nisi qui noxam meruisset, donec pœnam lueret, in compedibus aut in nervo teneretur; pecuniæ creditæ bona debitoris, non corpus, obnoxium esset. Liv. viii. 28. Successit ergo ex eo tempore in additionis

illius locum possessio et venditio bonorum." Antiq. Rom. Appendix lib. i. cap. 1. sec. 30.

Finally, although the *nexum* continued in force, it was henceforth no longer the important institution which it had been, and from the period of the *lex Poetilia* the *datio* of the money gave rise to a strictly civil obligation. A further change followed in time, when a simple *datio* without a formal ceremony, but accompanied by the *stipulatio*, sufficed. Gaius mentions both the verbal and the real obligation, but he does not speak of the *nexum*; not that it was illegal or impossible in this time, but the nation had outgrown in its legal life the severe institution of the earlier age of Rome, and had burst the trammels of this harsh and oppressive law. When Gaius speaks of a person being liberated from an obligation by a "*species imaginariæ solutionis, per æs et libram*," he makes allusion to an existing but no longer important institution, and thus demonstrates that the "*nexum*" was not altogether extinct, but that it was still possible to employ its form for the accomplishment of certain legal results. Gai. iii. 173, 174. Dion. lib. 6. c. 29, 37, 83. Varro de ling. Lat. lib. vii. 105. Liv. vi. 14, 20, 34, 36. Fest. de verb. sig. sub voce "*Nexum*." Diet. Gr. Rom. Antiq. under "*Nexum*." Walter's *Rechtsgeschichte*, ss. 483, 583, 598. Cic. de Repub. ii. 34.

28. *Incorporales res traditionem non recipere manifestum est. (l)*

28. It is evident that incorporeal things are not the subjects of tradition.

(*l*) *Traditio*, or delivery, is, doubtless, the most frequent and most important means of acquiring ownership. Property might be acquired by what in Roman law was termed *Occupatio*, but such acquisitions only rarely occurred. The importance of *Traditio* will be manifest when we say that dominium could never be acquired merely by contract. A person could not obtain the legal dominium over a thing by purchase, or by a contract of sale, or by gift. In such cases, in order to obtain the dominium, there must be added

traditio, or delivery. If the delivery of the thing were refused, an action would lie against the wrong-doer, on the ground of the obligation, but without the delivery there could be no dominium. If a man, for example, bought a house, and paid the entire purchase money, and the house was not given up to him, or as we express it, if he were not put into possession, he had not the least right in the house, but only an action arising out of the obligation. Thus, Diocletianus says, "Traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur." l. 20. Cod. de pactis. There are two points in relation to *traditio* to which attention should be directed. 1st. The requisites to a valid *traditio*. 2nd. The legal operation of *traditio* itself.

On the first point, it is to be observed that the traditor must be the dominus, and he must be legally qualified to make the traditio or delivery. Hence when a pupil or ward endeavoured to make a *traditio*, it was invalid *ab initio*, as he possessed no legal qualification. Again, there must be in every case the "animus transferendi," in order to the change of ownership. The dominus may simply intend to lend a person a thing, and the latter might suppose that he intended to bestow it as a gift; but, as there was no "animus transferendi," the dominium could not and did not pass. Again, on the part of the person to whom the *traditio* was made, there must be the capacity to accept, and to acquire things in commercio the accipiens must have the commercium. Some things, however, are deemed extra commercium only as far as a certain class of persons is concerned. Such things are said to be "extra commercium singularum non omnium." When the accipiens does not possess the commercium, he cannot obtain the dominium. There must also be on the part of the accipiens the "animus dominium acquirendi." Further, there must be what the Romans denominated a "justa causa præcedens." That is to say, there must be a legal transaction, or such other act or event by which it becomes manifested *objectively* that it is the intention of the owner, by means of the *traditio* to transfer the

entire *dominium*. Finally, there must be the actual transfer of the "possessio" of the thing. It may not be in the hand, but it must be, in every case, in such convenient proximity to the accipiens that he may either take it, or enter upon it at his pleasure. When the above things concurred, then the requisites for *traditio* were complete.

Secondly. In relation to the operation of *traditio*, it is to be observed in the first place, that the ownership is transferred to the new acquirer, just as it was possessed by the traditor himself. The traditor, as the rule, could pass no greater ownership than that which he possessed, and he passed nothing less. Ulpianus says, "*Traditio nihil amplius transferre debet, vel potest ad eum, qui accipit, quam est apud eum, qui tradit. Si igitur quis dominium in fundo habuit, id tradendo, si non habuit, ad eum qui accipit nihil transfert.*" l. 20 pr. Dig. de adq. rer. dom. (41. 1).

This general rule however admitted of some modification; as the traditor might, if he pleased, impose certain reservations. He might say that certain rights should not pass. He might, for example, reserve for himself an usufruct for his life; or he could, so to speak, carve out a servitude. The traditor, on the other hand, might at times apparently convey a larger right than he himself enjoyed. For instance, there was a rule of Roman law that mere obligatory burdens which bound the traditor personally were held not to affect the new owner at all. It was only real limitations and not mere personal obligations that bound the transferee. To take an illustration: Suppose a man owned a farm, which he had let on lease to a farmer, say for a period of twelve years, and that before the expiration of the term, he saw fit to sell the estate, or even to give it away. The new owner needed not to trouble himself in the least with the outstanding term remaining under the farmer's agreement, as he could oust the tenant from the farm whenever he pleased. The Germans have put this rule into a terse maxim when they say "*Kauf bricht Mieth.*" That is, the sale destroys the lease. Of course the farmer would have

his remedy against the former owner in an *actio in personam* for the injury he might receive. This seems to be an example in which a person conveyed more than he himself possessed; but it is only so in appearance. The contract of letting and hiring was a personal obligation and did not operate as a clog to the real right of the former owner in his land. There was in this case no limitation of the right of the owner and no fetter on his land, but there existed simply the personal obligation by which he was bound. Hence, the purchaser or donee could legally eject the farmer from the estate. If a man, however, imposed on his land a usufruct, the case was different, for then the clog was on the land, not simply on the person, and the purchaser took, as it was expressed, "*res cum suo onere cum sua causa.*" So also in the case of a mortgage, the fetter was then on the pledged land, and the party who became owner held the estate subject to the existing rights of the mortgagee.

29. Sed jura prædiorum urbanorum in jure tantum cedi possunt; rusticorum vero etiam mancipari possunt. (m)

29. Rights pertaining to urban estates can only be ceded *in jure*, but rights affecting rural estates can be conveyed by mancipation.

(m) The history of the doctrine of Servitudes is one of the most important for the consideration of the student of Roman law. In this note we purpose to present the broad outlines of the subject. The civilians speak of "*jura in re aliena*," under which category they place, first, servitudes—second, emphyteusis and superficies—and third, mortgages. This note will treat only of the first of these divisions, and present principally an historic view. Servitudes, in Roman law, dated back to the very earliest period of the state. The "*jus in re aliena*," in ancient Rome, originated in the necessities of life and of good neighbourhood. Servitudes were held to be also "*utilitas prædii*," as the condition of a country like Italy, without roads, and needing water for cattle and irrigation, rendered it for the benefit of the state

and of every landed proprietor, that something of strict right should be abated for the benefit of the owners, and to facilitate the cultivation of the soil. We thus see how easily a customary law would spring up, which being modified at different periods by legal principles and doctrines, would be subsequently guarded and protected by actions, until finally a law of servitudes or easements would be evolved, that must have been of incalculable and lasting benefit to the Roman people.

The “servitutes prædiorum rusticorum” were the most ancient servitudes. These were way and water rights, or, as Gaius enumerates them, in sec. 15 of this book, *via, iter, actus* and *aquæ-ductus*. When we turn to the laws of the Twelve Tables we find the “servitutes” just mentioned, and that of *via* especially referred to. “De viæ latitudine” viii. 10. “Quomodo via immunita utendum sit.” viii. 11. One of the laws referred to provided that when a man granted a right of way on his land, and nothing was said about the width of it, the legal width should be eight feet, and that *in anfractum*, that is, at the part where the waggon has to turn, it should be not less than sixteen feet wide. “Viæ latitudo,” says Gaius, “ex lege XII Tabularum in porrectum octo pedes habet; in anfractum, id est ubi flexum est, sedecim.” l. 8. Dig. de servitut. præd. rustic. (8. 2.) Varro confirms this, for he says, “Anfractum est flexum, ab origine duplici dictum ab ambitu et frangendo; ab eo leges jubent in directo pedum octo esse, in anfracto sexdecim, id, est in flexu.” de ling. Lat. vii. 15. The “servitutes prædiorum rusticorum” constituted a further development of the ancient servitudes, and at a still later period arose what are denominated the personal servitudes, and among them “usufructus” as the earliest and a pattern for the rest. As the prædial servitudes were the oldest, it is not singular that in the Roman language the word “servitudes” is always, when used alone, applied by the Romans to the class just mentioned. As to the origin of servitudes, they might arise either through contract, or by prescription.

1. The origin of a servitude by the private disposition of the owner. In the ancient times of Rome, the rule was that a servitude could only be constituted by means of the *in jure cessio*. In this fictitious suit there was an "imaginaria vindicatio servitutis." An imaginary "actio confessoria" was instituted, when the dominus of the intended servient tenement did not defend the action, but acknowledged the right, and hence, upon the owner's acknowledgement, the servitude arose. But in the case of *servitutes rustici* which consisted of "res Mancipi," there was required the form of conveyance known as *mancipatio*. Gai. ii. ss. 29, 30. Ulp. tit. xix. 11. Paulus says, "Tametsi ususfructus fundi Mancipi non sit, tamen sine auctoritate alienare eum mulier non potest, cum aliter quam in jure cedendo id facere non possit, nec in jure cessio sine tutoris auctoritate fieri possit. Idemque est in servitutibus prædiorum urbanorum." Vat. Frag. 45.

Such then was the law of Rome during the period of the Republic, and at the time of Gaius, until the reign of Julian. There was no other way if the servitude was to be established by contract, except to employ the *in jure cessio*, or the *mancipatio*. Gaius declares in the text, and in the following section, that a *quasi traditio* of a servitude of a *res incorporalis* was inadmissible. So that when the *in jure cessio* or the *mancipatio* were inapplicable, as was the case with provincial land, there was no possibility of there being any real servitudes constituted. The difficulty was partially remedied by obligations, by purchases, and by stipulations. But, strictly speaking, there could be no real servitudes in such cases. Take the following instance: A man obtained an agreement from his neighbour, that he and his successors should have certain privileges on his neighbour's land. There could be no *actus*, no *via*, &c., granted in the strict sense, the land being provincial, but though the party could have no *jus agendi*, and no *jus eundi*, the grantee was held to have a certain claim, and in order to confirm and strengthen this pactio, a personal penalty was stipulated for,

and these are the “*pactiones et stipulationes*” mentioned by Gaius in sec. 31 of the present book, about which there has been so much dispute, in connection with grants of privileges on provincial land. Some jurists have affirmed that a real servitude could be founded by a mere agreement, but this is not the meaning of Gaius, and such a view is quite erroneous. 1. 20. Dig. de servitut. (8.3) 1. 3. sec. 2. Dig. de action. emt. (19.1) 1. 43. sec. 2. de acquir. rerum (41. 1).

It was not till the time of the Emperor Severus, that, through the influence of the writings of Paulus and Ulpianus, the doctrine of *quasi traditio* was built up. By this means the right of real servitude in provincial land was originated. Thus arose two distinct rights of servitude, analogous to dominium, “*ex jure quiritium*” and “*in bonis*.” These real servitudes might, after the period mentioned, be constituted in two distinct ways: either *jure constituta*, *mancipatio* aut *in jure cessio*; or, *tuitione prætoris constituta*, which was the only mode applicable to provincial land. 1. 1. pr. Dig. in quibus mod., etc. (7. 4). Vat. Frag. sec. 61. 1. 9. sec. 1., where Ulpianus says, “*Illud sciendum est, sive jure quis usumfructum habet, sive etiam per tuitionem prætoris, nihilominus cogendum esse fructuarium cavere, aut actiones suscipere.*” 1. 9. sec. 1. Dig. de servit. (7. 9.) 1. 3. si usuf. pet. (7. 6).

In the later imperial law, the *in jure cessio* and the *mancipatio*, as means for the creation of a servitude, became invalid, and the *quasi traditio* alone remained. Even the *quasi traditio* passed away in the time of Justinian, but the opinion that a servitude could be created by a mere agreement rests upon an erroneous interpretation of the passage to which we have already referred.

A servitude might however be created by a legal transaction in another way, namely by what was termed “*deductio*.” In this case the owner of the property retained to himself as dominus such servitudes as he chose to impose. But this only took place when the transfer of the property was made by *mancipatio* or *in jure cessio*. In the

time of the classical jurists a "deductio" could not be made by mere tradition. But a servitude "tutione prætoris" might be constituted by *traditio*, and in the time of Justinian the universal rule was that if the traditor wished he could retain a servitude on the property he was conveying to another. Paulus says, "Per mancipationem deduci usufructus potest, non etiam transferri. Per 'do lego' legatum et per in jure cessionem et deduci et dari potest." Vat. Frag. 47. Again, he says, giving the form for the "deductio," "In mancipatione vel in jure cessione an deduci possit vel ex tempore vel ex conditione vel ad conditionem, quemadmodum si is, cui in jure ceditur, dicit. Aio hunc fundum meum esse, deducto usufructu ex kal. Jan., vel deducto usufructu usque ad kal. Jan. decimas; vel aio hunc fundum meum esse deducto usufructu, si navis ex Asia venerit (vel navis ex Asia non venerit.) Item in mancipatione: Emptus mihi esto pretio, deducto usufructu ex kal., illis vel usque ad kal. illas: et eadem sunt in conditione. Vat. Frag. 50. Gai. ii. 33. ll. 32, 36, 54. Dig. de usufructu (7. 1.)

2. A servitude may have its origin in prescription, and in ancient Rome, in accordance with the law of the Twelve Tables, in a single year. "Usus-auctoritas fundi biennium, ceterarum rerum annus esto." Servitudes belonged to the class "cæteras res." Paulus says, "Libertatem servitutem usucapi posse, verius est, quia eam usucapionem substulit lex Scribonia." l. 4. s. 29. Dig. de usurp. (41. 3.) The passage just cited is all we know upon the repeal of the usucapio of servitudes. Whether this lex Scribonia applied to every species of servitudes, or whether it was limited in its operation, we have no means of deciding. What is known is that in the time of the classical jurists there could be no usucapio of a servitude. The prescription of a servitude, however, did not cease, for by the practice and decision of the courts, it was determined, that where a servitude had been enjoyed "nec vi, nec clam, nec precario" for ten or twenty years, according as the owner of the servient tenement might be present or absent, as in the "prescriptio

longi temporis," a valid and legal servitude should be deemed to exist. This rule of law was fully maintained by the jurisprudence of Justinian.

Servitudes were extinguished by "non usus" and especially by the "usucapio libertatis." In the ancient law, servitudes ceased by "non usus," but for urban servitudes there must be the "usucapio libertatis." The rule in the latter case was two years for immoveables and one year for moveables and personal servitudes. Thus, a servitude over a slave or a horse would be lost in one year, on a house in two years. Paulus says, "Non utendo amittitur usufructus, si possessione fundi biennio fructuarius non utatur vel rei mobilis anno." Recep. Sen. iii. 6. 30. The general principle as to the extinction of servitudes, was admitted into the laws of Justinian, but the period for prescription was lengthened. Ten years for *presentes*, and twenty years for *absentes* were the periods substituted for the shorter terms. 1. 16. pr. Cod. de usuc. (3. 33.) 1. 10. Dig. de serv. (3. 24.) Again, personal servitudes were extinguished, not only by the death of the party entitled, but by every "capitis deminutio." Such at least was the case with "usufructus," and also with "usus." "Habitatio" was, although classed with servitudes, a species of alms, or charity, entitling the person enjoying it to the use of a dwelling. It was, essentially, a civil institution, and hence the capitis deminutio did not extinguish the servitude. Under Justinian the principle that regulated "habitation" was extended to usufructus and to usus, so that they were not extinguished by a "capitis deminutio minima." 1. 16. sec. 2. Cod. de Usuf. (3. 33.) By a singular theory it was held that an usufructus was extinguished when the usufructuary endeavoured to transfer it in jure cessio. Pomponius defended this view. He held that all servitudes were non-transferable, and hence that the right of the usufructuary could not in any case be transferred. Hence, when the usufructuary endeavoured to convey his right to another, whilst it passed from the usufructuary, the party to whom he attempted to con-

vey took nothing. Pomponius taught that as soon as the usufructuary had solemnly expressed his intention no longer to exercise his servitude, his right was gone. Thus, it was lost to the usufructuary, without the person to whom he conveyed being able to acquire it, and it reverted to the dominus. Gaius took a different view, and held that the whole transaction was inoperative, *nihil agitur*; this is the doctrine propounded in his Institutes, and subsequently received by Justinian into his legislation. 1. 66. Dig. de jure dot. (23. 3.) Gai. ii. 30. l. 66. Dig. tit. cit. in which the view of Pomponius is stated and referred to by the emperor. sec. 3. Inst. de usufruc. (2. 4.)

Among the most important servitudes we must place the different rights of way—*iter*, *actus* and *via*. Modestinus thus marks the difference between *iter* and *actus*: “*Iter est enim qua quis pedes vel eques commeare potest; actus vero ubi et armenta trajicere et vehiculum ducere liceat.*” 1. 12. Dig. de servit. (8.3). The servitus itineris was technically denoted by the words *jus eundi*, the actus *jus agendi*. Via included the jura eundi, agendi et ambulandi, and gave the power of using the road in any way, provided no damage be done. “*Qui viam habent eundi agendique jus habent plerique et trahendi quoque et rectam hastam referendi si modo fructus non lædat.*” 1. 7. pr. Dig. de eod. (8.3). Points of detail, in regard to other servitudes will be treated of subsequently, but the following maxims should be remembered, as containing fundamental principles. 1. Servitus in faciendo consistere nequit. 2. Servitus servitutis esse non potest. 3. Nemini res sua servire potest.

30. Ususfructus in jure cessionem tantum recipit. (u) Nam dominus proprietatis alii usumfructum in jure cedere potest, et ille usumfructum habeat, et ipse nudam proprietatem retineat. Ipse usufructuarius in jure cedendo domino proprietatis usumfructum efficit, ut a se discedat et

30. The usufruct can only be transferred by *in jure cessio*; for the owner of the property can cede *in jure* the usufruct to another person, so that the latter has the usufruct, and he himself retains a mere naked ownership. When the usufructuary cedes his usufruct to the proprietor

convertatur in proprietatem. Alii vero in jure cedendo nihilominus jus suum retinet: creditur enim ea cessione nihil agi. (n)

in jure, it so operates, that the usufruct departs from him and is absorbed in the property of the owner, but the usufructuary retains his right notwithstanding that he has ceded *in jure* to another, not the owner; for it is considered that this kind of transfer has no legal operation.

(n) Paulus defines “usufruct” as follows: “*Ususfructus est jus alienis rebus utendi fruendi salva rerum substantia.*” 1. 1. Dig. de usufructu (7. 1.) The closing sentence “*salva rerum substantia*,” is only an emphatic repetition of what was implied in the words “*utendi fruendi.*” Cicero says, “*Usus enim, non abusus legatus est.*” Top. 3. The right of enjoyment vested in the person entitled to the usufruct was so great that there remained nothing to the actual owner but what was termed a “*nuda proprietas.*”—Nothing was left for his *enjoyment*. To the usufructuary, however, belonged the *usus* and the *fructus* only, not the thing itself. He had only the use, not the misuse of the thing. Again, it was to the fruits, in the strict sense of the term, that the usufructuary was entitled, not, for example, to the “*partus ancillæ fructuariæ.*” Nor could he convert a dwelling house into a tavern, nor cut down the trees. He might cut from a wood necessary poles and fencing, but he could not sell the timber off the estate. The property must not, in any respect, grow worse in his hands, nor must it be essentially altered. It was the duty of the usufructuary to use diligence in the preservation of the property, and he was liable for *omnis culpa*. He had to pay current expenses for repairs, as well as all taxes and imposts. When the usufruct terminated, the property must be returned to the owner unimpaired. For the security of the proprietor the person enjoying the usufruct was bound to give security by the so-called “*cautio usufructuaria.*” The object of an usufruct could, as the rule, be only a corporal thing and “*res quæ usu non consumitur.*” Still there was a “*quasi ususfructus*”

on *res incorporales* and *res consumptibiles*. Similar provisions held good in regard to the quasi usufructus, as to the actual usufructus, and a “*cautio*” had also to be given.

31. Sed hæc scilicet in Italicis prædiis ita sunt, quia et ipsa prædia mancipationem et in jure cessionem recipiunt. Alioquin in provincialibus prædiis sive quis usumfructum sive jus eundi, agendi, aquamve ducendi vel altius tollendi ædes, aut non tollendi, ne luminibus vicini officiat ceteraque similia jura constituere velit, pactionibus et stipulationibus (o) id efficere potest; quia ne ipsa quidem prædia mancipationem aut in jure cessionem recipiunt.

31. But these things are only applicable in regard to real estates in Italy, because these are susceptible of mancipation and of *in jure cessio*. In the provinces, on the contrary, if any one wish to establish a usufruct, or a right of way, either of driving cattle, of water-course, or of raising buildings higher, or of not raising them, lest he injure his neighbours' light, and any other such rights, he can effect it by agreements or stipulations only; because the estates themselves are transferable neither by mancipation nor by the *in jure cessio*.

(o) *Pactionibus et stipulationibus*. See Instit. ii. 4. sec. 1.; ii. 3. sec. 4. Gai. in l. 3. p. Dig. de usuf. (7. 1). “Sine testamento autem si quis velit usumfructum constituere, pactionibus et stipulationibus id efficere potest.”

32. Et cum usufructus et hominum et ceterorum animalium constitui possit, intellegere debemus horum usumfructum etiam in provinciis per in jure cessionem constitui posse. (p)

32. Since an usufruct can have for its object both slaves and animals, we ought to understand that an usufruct of these can be established in the provinces by the *in jure cessio*.

(p) The personal servitudes were *ususfructus*, *usus* and *habitatio*. The two first might have for their object both moveables and immoveables, provided they were not consumed in the using. *Habitatio* was not so strict as the usufructus, since it was a servitude enjoyed more as the result of kindly and charitable feeling than as a strictly legal constitution. ll. 2. 5. Dig. de usufructu. (7. 1). The usufructuary was bound to give security (*cautio*) to the person

having the *nuda proprietas*, that he would, if required, make good any claim against him, arising out of, and to the value of, the property he held as a usufruct. Ins. sec. 2. de usufructu. (2. 4). In sec. 3. Justinian lib. cit., we learn that the usufruct was terminated by the death of the usufructuary, by his capitis deminutio, by non-usage, by the *in jure cessio* to the person having the *nuda proprietas*, and by the destruction of the thing itself. At the time of Gaius, as previously stated, either of the capitis deminutiones destroyed the usufruct, but at the time of Justinian, the capitis deminutio maxima and media only, and not the minima, had that effect. When the usufruct was granted only for a term, or under a condition, it ceased upon the expiration of the term, or upon the happening of the condition.

33. Quod autem diximus usufructum in jure cessionem tantum recipere, non est temere dictum, quamvis etiam per mancipationem constitui possit eo quod in mancipanda proprietate detrahi potest; (q) non enim ipse usufructus mancipatur, sed cum in mancipanda proprietate deducatur, eo fit, ut aput alium usufructus, aput alium proprietas sit.

33. Our assertion that an usufruct is constituted only *in jure cessio* has not been made rashly; for although it may be established by means of mancipation in this manner that it can be subtracted from property about to be mancipated, yet in this case it is not the usufruct that is mancipated; but by being withdrawn from the property to be mancipated, it happens that the usufruct passes to one, and the property vests in another.

(q) *Detrahi potest.* Paulus says, "Per mancipationem deduci usufructus potest, non etiam transferri. Per do lego legatum et per in jure cessionem et deduci et dari potest. Item potest constitui et familiæ erciscundæ vel communi dividundo judicio legitimo. In re nec Mancipi per traditionem deduci usufructus non potest; nec in homine, si peregrino tradatur: civili enim actione constitui potest, non traditione quæ juris gentium est." Vat. Frag. sec. 47.

34. Hereditas quoque in jure cessionem tantum recipit. (r)

34. The *hereditas* also can only be transferred by means of the *cessio in jure*.

(r) *Hereditas*. By the term *hereditas* (inheritance) is to be understood the entire property left by a deceased person, viewed especially as the subject of a legal universal succession. Gaius says, "*Nihil aliud est hereditas quam successio in universum jus, quod defunctus habuit.*" l. 24 Dig. de verb. sig. (50. 16). The term *hereditas* is used in opposition to *bona*, the latter word denoting the entire property of a person, including his obligations and his debts. When the *fiscus* succeeds to the estate, in consequence of the *defunctus* leaving no heir, such property was called *bona vacantia*. As this subject must be more fully explained, it is deferred till we come to where Gaius treats of the law of Inheritance. See secs. 99. et seq.

35. Nam si is ad quem ab intestato legitimo jure pertinet hereditas in jure eam alii ante aditionem cedat, id est ante quam heres extiterit, perinde fit heres is cui in jure cesserit, ac si ipse per legem ad hereditatem vocatus esset: post obligationem vero si cesserit, nihilominus ipse heres permanet et ob id creditoribus tenebitur, debita vero pereunt, eoque modo debitores hereditarii, lucrum faciunt; corpora vero ejus hereditatis perinde transeunt ad eum cui cessa est hereditas, ac si ei singula in jure cessa fuissent.

35. For, if he to whom the *hereditas* of an intestate falls by the right of law cedes it *in jure* to another before he has entered upon it, that is to say, before he has been declared heir, he to whom the right of succession is ceded *in jure* becomes heir just as if he himself had been called to the inheritance by the statute: but if it is ceded after it has been entered upon, (or after the obligation) he who cedes remains heir notwithstanding the cession, and will therefore be held bound to the creditors, but the debts are lost, and in this manner debtors to the estate make a gain. The corporal things of the *hereditas* are however transferred to the party to whom the *hereditas* has been ceded, just as if each particular object had been ceded *in jure*.

36. Testamento autem scriptus heres ante aditam quidem hereditatem in jure cedendo eam alii nihil agit: postea vero quam adierit si

36. But the heir appointed by the will, when he cedes the *hereditas* to another *in jure*, before he has entered upon it, performs an act of no effect:

cedat ea accidunt quæ proxime diximus de eo ad quem ab intestato legitimo jure pertinet hereditas, si post obligationem *in jure* cedat.

37. Idem et de necessariis heredibus(s) diversæ scholæ auctores existimant, quod nihil videtur interesse utrum *aliquis* adeundo hereditatem fiat heres, an invitatus existat: quod quale sit, suo loco apparebit. Sed nostri præceptores putant nihil agere necessarium heredem, cum *in jure* cedat hereditatem.

but, if he cede after entrance, the same results follow as in the case we have last mentioned, when we were speaking of the person to whom the *hereditas* legally falls in case of intestacy, if he cede it *in jure* after assuming the obligation.

37. Writers of the opposite school think the same in regard to the *heredes necessarii*, because it appears to make no difference whether a person becomes heir by entrance upon the *hereditas* or against his will; how that may be shall be made plain in its proper place; but our teachers are of opinion that the *heres necessarius* performs an act null and void when he cedes the *hereditas in jure*.

(s) *De necessariis heredibus.* The question has been raised whether Gaius in this passage refers to the “heredes necessarii,” in the strict sense of the term, or to the “heredes *sui* et necessarii.” It has been suggested that he is speaking in this section only of the *heredes necessarii*, because he places this in close connection with a paragraph in which he treats of the cession made by a “heres testamentarius;” and, further, because the Roman juriconsults rarely designate the “heredes *sui* et necessarii” by the expression “heredes necessarii” without employing the word *sui*. Compare, however, sec. 87 of this book, which seems to justify the opinion of those who maintain that Gaius here treats of “heredes *sui* et necessarii,” although he only mentions “heredes necessarii.” See Domenget *in loco*.

38. Obligationes quoquo modo contractæ nihil eorum recipiunt. Nam quod mihi ab aliquo debetur, id si velim tibi deberi, nullo eorum modo quibus res corporales ad alium transferuntur id efficere possumus; sed opus est ut jubente me tu ab eo stipuleris: quæ res efficit, ut a me

38. Obligations, in whatever manner they may have been contracted, do not admit of this kind of transfer. For if I wish that which some one owes to me to be transferred to you, I can effect this by no one of these modes by which *res corporales* are transferred, but you must upon my

liberetur et incipiat tibi teneri: quæ dicitur novatio obligationis. (t)

order obtain a *stipulation* from my debtor. This operates thus, that he is freed from his obligation by me, and is henceforth bound to you. This is called the *novatio* of the obligation.

(t) *Novatio obligationis*. Novatio was one of the methods employed by the Romans to dissolve an existing obligation. It was the changing of a present debt (*debitum*) into another obligation, the result of which was that the previous obligation was satisfied and dissolved. "Novatio est prioris debiti in aliam obligationem, vel civilem, vel naturalem transfusio atque translatio, cum ex præcedenti causa ita nova constituitur, ut prior perimatur. Novatio enim a *novo* nomen accepit et a *nova* obligatione." l. 1. pr. Dig. de novat. et deleg. (46. 2.) See also Gaius iii. sec. 176. Novatio will be more fully explained when the Roman law of "Obligations" comes under our consideration.

39. Sine hac vero novatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri.

39. But without this novatio you cannot sue in your own name, but you must sue in my place, as my *cognitor* or *procurator*.

40. Sequitur ut admoneamus apud peregrinos quidem unum esse dominium: ita aut dominus quisque est, aut dominus non intellegitur. Quo jure etiam populus Romanus olim utebatur: aut enim ex jure Quiritium unusquisque dominus erat, aut non intellegebatur dominus. Sed postea divisionem accepit dominium, ut alius possit esse ex jure Quiritium dominus, alius in bonis habere. (u)

40. We must now mention that among the peregrini there is only one species of *dominium*; thus a man is either absolute owner, or is not regarded as owner. The Roman people were also formerly subject to this kind of law, for each owner was either proprietor, *ex jure Quiritium*, or was not looked upon as proprietor at all. But subsequently a division of *dominium* came into vogue, so that one person could be owner, *ex jure Quiritium*, while another was considered to hold *in bonis*.

(u) *Unum esse dominium*. The idea of ownership is so natural, "*alicujus, meum, nostrum esse*," that it may be

safely affirmed that it dated back to the earliest period of the Roman state. Originally, however, there was but one kind of legal ownership, the nature of which is indicated by the technical expression "*res mea est ex jure Quiritium*." At a later period, ownership, (*singuli, privi*) was limited to moveable things, for the land, as the *ager publicus*, was under the dominium and control of the State; whilst the citizens only had a kind of usufruct of the land, by the permission of the ruling authorities, added to the possession to which they were admitted as a privilege. Thus absolute and unlimited ownership was a thing quite unknown in the early period of Roman law. Subsequently, however, these restrictions were relaxed, and there came to be an actual ownership of land, whilst only a remnant of the *ager publicus* remained as the reserved property of the state. At a still later period a further relaxation of the strict rule in relation to ownership took place, so that Italian land (*Italicum solum*) could be held "*ex jure Quiritium*:" provincial land, however, could not be thus held, and it may be undoubtedly affirmed that it was only enjoyed by a species of possession. For five hundred years there existed at Rome only dominium "*ex jure Quiritium*," and to hold land in this ownership, a man must be either a *civis Romanus*, or a *Latinus* possessed of the *commercium*. Moreover, the dominium "*ex jure Quiritium*" could only be obtained by the employment of strict, civil forms. Thus "*res mancipi*" could not be acquired by *traditio*, but only by "*mancipatio*," or the "*in jure cessio*." The oldest name given to what came afterwards to be called "*dominium*," was *usus-auctoritas*, and to protect this, the Roman citizen had the *jus vindicandi*. The term "*dominium*" had not come into use at the time of the enactment of the laws of the Twelve Tables. During the period of what was termed the "*legis actio*"—an expression which marks an epoch in Roman civil procedure—an important form of action was employed, known as the "*vindicatio*." In the presence of the judge, the plaintiff laid his hand upon the thing in dispute and affirmed that

it belonged to him "*ex jure Quiritium*." The defendant made a *contra-vindicatio*, using the same formal words. The magistrate then ordered both parties to relax their grasp upon the disputed object, and at once decided who should hold possession during the process of the action and until the close of the suit; compelling the party thus entrusted to give bail (*cautio*) for the preservation of the disputed property, and its production at the required time.

During the last century of the Roman republic there arose a new species of ownership, and one which had its origin in the *jus gentium*. For this new species the Romans used the expression "*res in bonis meis est*," or "*res in bonis mea est*." The expression now employed to designate this property—bonitarian ownership—was not used by the old Roman jurists, but was first introduced by Theophilus in the time of Justinian. This new kind of ownership was called *natural* as having its origin in that *jus gentium* which was supposed to include the system or principles of law common to all mankind. To hold property *in bonis* fewer requisites were deemed necessary. Theophilus says, "*Est igitur—legitimum dominium et naturale dominium. Ac naturale dicitur in bonis et dominus bonitarius; legitimum vero dicitur jure Quiritium, id est Romanorum. Quirites enim dicuntur Romani a Romulo ex quo originem habuerunt; et dominus jure quiritorio. Sed si quis utrumque habebat dominium, dicebatur pleno jure dominus, utpote ambo habens, legitimum et naturale.*" Theoph. ad sec. 4. Inst. de libertinis (1. 5). ed. Reitz.

When a person had acquired the legal possession of a thing, not however by *civiles acquisitiones*, but only by *naturales*, in accordance with the forms and principles of the *jus gentium* which had not received the sanction of the *jus civile*, he was not only permitted to enjoy the benefits of *usucapio*, but was treated as if he were the actual owner of the property. Still, he did not hold his property *ex jure Quiritium*, but merely *ex jure gentium*, and this peculiar holding of property was expressed by such phrases as "*res*

in bonis ejus erat," or "rem in bonis habebat." For this limited ownership there was required only the commercium, and a marked feature of it was, that it could be enjoyed equally by foreigners (*peregrini*) as by Roman citizens. Again, provincial soil, which had been held hitherto only in possession, giving rise to no ownership, came now to be held "in bonis." Moreover, by virtue of the *jus honorarium* of the prætor, a variety of modes of acquisition were from time to time introduced, hitherto quite unknown to the rigour of the *jus civile*. Whilst, however, bonitarian ownership was much more easily acquired, it was much more limited in the sphere of its operation. In regard, for instance, to the action for its protection, the owner *in bonis* could not use the "vindicatio ex jure Quiritium," but there was given to him by the prætor a "utilis vindicatio." He had, indeed, the full enjoyment of the fruits of the land, but he could not convey his property by "mancipatio," nor "in jure cessio." Nor could he devise such property "per vindicationem." These and several other advantages and rights belonging to Quiritarian ownership, were denied to the owner "in bonis." It is both interesting and remarkable that, for nearly one thousand years, these two distinct modes of holding property existed and, as it were, ran parallel to each other in Roman legal history.

In the later period of the Roman law ownership "in bonis" was by Justinian completely abolished, so that if an owner had not dominium "ex jure Quiritium," he had no ownership at all. The emperor, in his constitution, says, "Antiquæ subtilitatis ludibrium per hanc decisionem explentes, nullam esse differentiam patimur inter dominos, apud quos vel nudum ex jure Quiritium, vel tantum modo in bonis reperitur; quia nec hujusmodi volumus esse distinctionem, nec ex jure Quiritium nomen, quod nihil ab ænigmate discrepat, nec unquam videtur, nec in rebus apparet, sed vacuum est et superfluum verbum, per quod animi juvenum, qui ad primam legum veniunt audientiam perterriti, ex primis eorum cunabulis inutiles legis antiquæ disposi-

tiones accipiunt; sed sit plenissimus et legitimus quisque dominus sive servi, sive aliarum rerum ad se pertinentium." Just. in const. unic. Cod. de nudo jure Quir. tol. (7.25.)

The constitution of Justinian, however, must be understood not as implying that all that appertained to bonitarian ownership had perished, but that in every case in which, before the publication of this constitution, the owner had held his property only in bonitarian ownership after its publication, he was entitled to be regarded in the eye of the law as holding it in full Quiritarian ownership. This change was an extraordinary extension of the law, for it had the effect of extending the Quiritarian ownership to provincial land, and so operated that a peregrinus who was a non-Roman became entitled to hold property "*ex jure Quiritium*." Thus, at last, it came to pass that in ancient Rome there was but one kind of ownership, namely, Quiritarian, with all the freedom, elasticity, and extension of ownership *in bonis*. The result of this alteration in the law was, that those who had not enjoyed the full ownership of their property became henceforth owners *ex jure Quiritium*.

41. Nam si tibi rem Mancipi neque Mancipavero neque in jure cessero, sed tantum tradidero, in bonis quidem tuis ea res efficitur, ex jure Quiritium vero mea permanebit, donec tu eam possidendo usucapias: semel enim impleta usucapione proinde pleno jure incipit, id est et in bonis et ex jure Quiritium tua res esse, ac si ea Mancipata vel in jure cessa esset.

41. For if I have neither mancipated to you as *res Mancipi*, nor ceded it *in jure*, but have simply delivered it, the thing does indeed become yours *in bonis*, but the ownership will remain mine *ex jure Quiritium* until you have held possession long enough to claim the thing by *usucapio*, for when the time of a *usucapio* is once accomplished, the thing will become yours absolutely *pleno jure*, that is, it is yours both *in bonis* and *ex jure Quiritium*, just as if it had been mancipated or given *in jure cessio*.

42. *Usucapio autem mobilium quidem rerum anno completur, fundi*

42. The *usucapio* of moveable things is completed in one year, that of

vero et ædium biennio; et ita lege
xii tabularum cautum est. (v)

lands and buildings in two years,
for so it is provided by the law of
the Twelve Tables.

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(v) In treating of the acquisition of *dominium* the Roman jurists mention two distinct *genera* or heads; these are either “*acquisitiones civiles*” or “*acquisitiones naturales*.” Dismissing for the present the consideration of natural acquisitions, it is to be observed that under the head of “*acquisitiones civiles*” they give three species or kinds—*mancipatio*, the *in jure cessio*, and *usucapio*. We have already treated of the two first modes of civil acquisitions, and in this note our remarks are to be confined to the third mode, namely, *usucapio*. These three kinds of civil acquisitions are said to belong to the *jus proprium* or the *jus Romanum* in the strict sense of the term. It is well to remember that in Roman jurisprudence, not including the modern civil law, there were three distinct epochs. There was the ancient *jus civile*; then came the modification of the strict national law by means of the edicts of the prætors; and after Rome had flourished for more than a thousand years came the modifications of the law introduced by the legal reforms of Justinian. This is not the place in which to explain minutely the causes of these great changes, but the progress and extension of the Roman nation, and the introduction of Christianity into the Roman empire, lay at the very basis of some of the greatest alterations that took place. *Usucapio* has been defined by Modestinus as follows: “*Usucapio est adjectio domini per continuationem possessionis temporis lege definiti.*” 1. 3. Dig. de usurp. et usucap. (41. 3.)

Usucapio was an institution that existed before the time of the Twelve Tables; and in the famous law so often on the lips of the jurist, “*Usus-auctoritas fundi biennium, ceterarum rerum annus esto,*” the decemviri only reassert the ancient law of the State. Cic. Top. c. 4. Pro Cæcina c. 19. On the meaning of these words there can be no dis-

pute : they enacted that the *legal ownership* of land should be acquired by two years' possession, and that of other things in one year. There has, however, been a great deal of controversy among jurists about the expression, "*Usus-auctoritas*." Many of the older jurists said that *usus-auctoritas* was equivalent to the *usucapio*, whilst not a few modern jurists even affirm that *usucapio* was, in the ancient law, the technical word for *usus-auctoritas*; and that *usus* is to be taken as a genitive case. Against this view it is to be observed that Cicero in his *Oratio pro Cæcina*, just cited, says "*usum auctoritatem*," not "*usus-auctoritatem*." *Usus*, in *usus-auctoritas*, must not be taken as the genitive, but as the nominative. Ballhorn-Rosen, in his work on *Dominium*, p. 233., says that the word *usus* denotes the possession of the person who takes the thing in *usucapio*; and that the word *auctoritas* expresses the right of the *dominus* for the time being, and he would render the passage thus: "Possession and dominium shall be extinguished after the lapse of two years, and shall pass to the new possessor." This explanation is ingenious, but it cannot be regarded as the correct one. If the *decemviri* had wished to express these ideas, they could have referred to the possession of the one party, and to the *auctoritas*, or *usus*, or *dominium* of the other; and they might have said, that under certain circumstances the latter should be extinguished. But they use a compound word—*usus-auctoritas*; and in this they are in perfect accord with the mode of expression common in other cases among the Roman jurists. Thus, for example, the Romans were accustomed to say, "*Populus Romanus Quirites; Patres Conscripti; Usus-fructus; Emptio-venditio; Senatus-consultum*;" all of which terms indicate the constituent parts which go to compose a single notion. Most modern jurists, with the exception of Von Vangerow, have adopted Ballhorn-Rosen's opinion, but the above is submitted as the correct view. *Usus-auctoritas* is a logical noun, and is equivalent to *plenum dominium*, or, as we say in English, *legal ownership*, meaning, in the present instance, by that phrase

the entire estate, both legal and equitable. Again, the phrase "*ceterarum rerum*" should not be taken, as it is so often, as simply equivalent to *res mobiles*, but it must be understood to mean all things that were fit for usucapion and were not *fundi*; of these things, it is said that the usucapion was to be completed in a single year. Whether both *bona fides* and *justus titulus* were needed in ancient Roman law we have no means to decide. Some jurists assert that these were required, but the better opinion seems to be that anciently for the usucapio of things comprised in the *res ceteræ*, all that was needed was *bona fides*, and the *usus-auctoritas* for a single year. There were many things to which a title could not be made out by usucapio, as for example, all *res extra commercium* and provincial land; to which is to be added every other species of property that could not be held by a Quiritarian holding. Gai. ii. 42, 44, 45, 49, 54, 204. Instit. Jus. ii. tit. vi. Nor could things that were stolen be the objects of usucapio, for in the Twelve Tables we find it was enacted "*Res furtiva ne usucapiatur*," and in the same ancient authority we also find that "*res mancipi mulieris quæ in tutela agnatorum sit ne usucapiantur*." See also Julianus in l. 33. Dig. de usucap. (41. 3.)

Not very long after the time of the decemviri the *lex Atinia* was passed; and we learn from Aulus Gellius, xvii. 7. sec. 1. the contents of that law as they bore upon this subject. He says, "*Legis veteris Atiniæ verba sunt: ut quod subruptum esset, ejus rei æterna esset auctoritas, nisi si in ejus, cui subreptum esset, potestatem revertisset*." It is not quite certain when this law was passed, but it has been supposed with probable correctness that it was in A.U.C. 566 or 567, as Caius Cornelius Cethegus and Q. Minutius Rufus were consuls at that time, and C. Atinius Labeo was tribune of the plebs. See Hein. Antiq. Rom. Syntag. lib. ii. tit. vi. sec. 4. The *lex Atinia* re-affirmed the provisions of the law of the Twelve Tables, with this addition, that the *vitium* which prevented a stolen thing being subject to usu-

capon was removed the very moment the stolen property was restored or came back into the possession and control of the real owner; the test of which would seem to be that he might be in a position to use the *vindicatio* to obtain the restitution of his property. If this did not take place the *vitium* was so great in a "*res furtiva*" that, to use the expressive language of the civilians, eternity alone could suffice to give a right of property in a stolen thing. Gaius does not only say that a thief shall not acquire by usucapio, because he has no *justus titulus* nor *bona fides*, but that the taint of theft is so great that it altogether precludes usucapio, even on the part of the *bona fide* possessor. Again, by the law of the Twelve Tables, neither the *forum* nor the *bustum* could be held by usucapio. The law says "*ne forum (sepulchre) bustumve usucapiatur.*" The *forum*, as we learn from Cicero, was the vestibule of the sepulchre, and the *bustum* was the place for burning the corpse outside the tomb. These places were *loci religiosi*. Without the sepulchre, there was usually a little plot reserved to burn the body of the deceased. Such spots have been found in the ruins of Pompeii, with a small urn in which were deposited the ashes of the dead. Cicero says, "*Quod autem forum id est vestibulum sepulcri, bustumve usucapi vetat, (that is, the law of the Twelve Tables,) tuetur jus sepulcrorum.*" De leg. ii. 24. s. 61. Again, by a further ordinance of the decemviri, it appears that *res Mancipi* which were under the *tutela* of agnates could not be held by usucapio. Gaius says, "*Item olim mulieris, quæ in agnatorum tutela erat, res Mancipi usucapi non poterant.*" Gai. ii. 47. And Papinianus says, "*Servos autem et pecora, quæ collo vel dorso domarentur, usu non capta.*" Vat. Frag. 259. Cic. ad Attic. i. c. 5. pro Flacco c. 34. Lastly, Cicero, de off. i 12. sec. 37, quotes the words of the decemviri, "*Adversus hostem æterna auctoritas esto;*" and explains that the word *hostes* had in ancient times a different meaning from that which it obtained in his time. With the ancients it meant not an enemy but a *foreigner*. To prove this he quotes the law

just cited. "Hostis enim," says he, "apud majores nostros is dicebatur, quem nunc peregrinum dicimus. Indicant duodecim tabulæ, AUT STATUS DIES CUM HOSTE. Itemque, ADVERSUS HOSTEM ÆTERNA AUCTORITAS." The prevailing opinion in relation to this law is that a *non civis* or a peregrinus should not be entitled to the benefit of usucapio as against a Roman. But there is a twofold objection to this view. In the first place, it is all but self-evident that a peregrinus could not be entitled to usucapio, for usucapio gave quiritarian ownership, and it was quite unnecessary to affirm that a peregrinus should not be entitled to quiritarian ownership. Then again it was an appointment of the Twelve Tables that against a peregrinus there should be *ætterna auctoritas*, which can only mean (and it shows the practical justice of the old Romans) that a peregrinus should not lose his property by the usucapio of a Roman. It was a law for the benefit of the foreigner. Only *eternity* could give a right by usucapio as against the peregrinus. That he, a stranger, should lose his property in a year or two, was held to be an insufferable hardship. It was a law in favour of the *hostis*. It springs from the same principle, and the same consideration, that prevailed in the later law, namely, that for absent owners a much longer time was required before usucapio could ripen into ownership. For the continuation of this subject, and the changes introduced by the *leges Julia et Plautia*, see the note to section 45. See also the note to sec. 49.

43. Ceterum etiam earum rerum usucapio nobis competit quæ non a domino nobis traditæ fuerint, sive mancipi sint eæ res sive nec mancipi, si modo ea bona fide acceperimus, cum crederemus eum qui tradiderit dominum esse.

43. Moreover, we acquire the *usucapio* of those things which have been delivered to us by any one not the rightful owner, whether they are *res mancipi* or *res nec mancipi*, if only we have received them *bona fide*, believing that he who delivered them was the rightful owner.

JUST. II. 6. pr.

44. Quod ideo receptum videtur, ne rerum dominia diutius in incerto

44. This custom appears to have prevailed, lest the ownership of

essent: cum sufficeret domino ad inquirendam rem suam anni aut biennii spatium, quod tempus ad usucapionem possessori tributum est.

things should remain too long in uncertainty, and since a period of one or two years sufficed for the owner to enquire concerning his possessions, this time was assigned as necessary to elapse in order to enable the possessor to hold by *usucapio*.

JUST. II. 6. pr.

45. Set aliquando etiamsi maxime quis bona fide alienam rem possideat, numquam tamen illi usucapio procedit, velut si qui rem furtivam aut vi possessam possideat; nam furtivam lex XII tabularum usucapi prohibet, vi possessam lex Julia et Plautia. (*w*)

45. But it sometimes happens that although a man has come into possession of the property of another, in perfect good faith, yet *usucapio* does not accrue to him: for example, when he possesses a thing stolen, or taken by force, for the law of the Twelve Tables prohibits the *usucapio* of a thing stolen, and the *lex Julia et Plautia* the *usucapio* of a thing taken by force.

(*w*) There were two *leges Juliæ* on violence: the first on public violence; the second on private. Both were passed in the year of Rome 746. The *lex Plautia*, carried in the year of Rome 665, was incorporated with the two Julian laws; hence, Gaius names the two Julian laws and the *lex Plautia* by the single designation of the *lex Julia et Plautia*.

46. Item provincialia prædia usucapionem non recipiunt.

46. Provincial land is not subject to usucapion.

47. Item olim mulieris quæ in agnatorum tutela erat res Mancipi usucapi non poterant, præterquam si ab ipsa tutore auctore traditæ essent: idque ita lege XII tabularum cautum erat.

47. Formerly, also *res Mancipi* belonging to a woman under the tutela of her agnati, did not admit of *usucapio*, except when they had been surrendered by herself under the authority of her tutor. This the law of the Twelve Tables has provided.

48. Item liberos homines et res sacras et religiosas usucapi non posse manifestum est.

48. It is evident that neither free men, nor *res sacrae*, nor *res religiosas* can be held by usucapion.

(x) Huschke says, "The awkwardness of the conclusion of sec. 47 has been felt and commented upon by the critics." He thinks that the following is the more correct reading: "*Id ita lege xii tabularum carente.*" In sec. 48 he omits *item* and reads, "*liberos homines, etc.*" Gaius, he says, does not always use his favourite word "*item*;" (compare for example ii. 280); and here it should be omitted on account of an opposition to the previous positive cases, making "*manifestum est*" decidedly more appropriate.

49. Quod ergo vulgo dicitur furtivarum rerum et vi possessarum usucapionem per legem xii tabularum prohibitam esse, in eo pertinet, ut ne ipso fur quive per vim possidet, usucapere possit (nam huic alie ratione usucapio non competit, quia scilicet mala fide possidet); sed nec ullus alius, quamquam ab eo bona fide emerit, usucapiendi jus habeat. (y)

49. What is said commonly, that the *usucapio* of things stolen, or seized by violence, is prohibited by the law of the Twelve Tables, does not mean that the thief, or he who gets possession of the things by violence, is unable to acquire by *usucapio*, (since another reason prevents his doing so, namely, that his possession is *mala fide*) but that no other person, even though he may have purchased from him in good faith, has the right accruing from *usucapio*.

(y) *Possessio*. The simplest notion that we can have of possession is that it consists in the physical holding of a corporal thing. There has been a good deal of discussion, and some mistakes have been made in relation to the nature of possession. The possessor has really the physical holding of the thing, to which is added the dominium in point of *fact*. The owner, on the other hand, is actually the *legal dominus*. The owner can legally do with his property what he wills to do. The possessor *may do* all that the actual owner can do legally. *Possessio* is in itself simply a fact, and it has nothing more legal about it than eating or drinking, or taking a walk. But whilst *possessio* is simply a fact, it is manifest that, as such, it may have a legal relevance. Possession may be the consequence of a right, or the fact

of possession may be the source and origin of a right. The right may be the "causa efficiens" giving rise to possession; or the possession may be in like manner a "causa efficiens" giving rise to a right. When a man has a legal claim to the possession, he is said to have a "jus possidendi," but when the fact of possession is the basis of his right, he is said to have a "jus possessionis." This distinction must be carefully noted. The "jus possessionis" is quite distinct from the "jus possidendi." It is this important distinction that renders it necessary to explain somewhat carefully the doctrine of *possessio*. Possession is to be regarded when we speak of the "jus possessionis" as a *right-generating fact*.

Thus, the "jus possessionis" consists in this, that the fact of possession produces a right. But for such to be its effect, in Roman law, the possessor must have an "animus rem sibi habendi aut possidendi." Hence, in the strict sense of the term, he only is called possessor who holds the thing with the intention and with the will to become its owner, and it is only of such that it can be predicated that he has a "jus possessionis."

There were three advantages, or jura, which resulted to the bona fide possessor. 1. He had a right to the benefits to be derived from the possessory interdicts—to the "interdictum uti possidetis," and to the "interdictum utrubi." These two interdicts are classed under the head of "interdicta retinendæ possessionis." The "interdictum uti possidetis" was employed to protect the possession of an immoveable thing, whilst the "interdictum utrubi" was used to protect that of a moveable thing. The possessor had a right to these interdicts, but not his heir, as such. The object of the interdicts was, so far as the possessor was concerned, to guard him against any further disturbance of his possession, and to obtain compensatory damages. Ulpianus says, "In hoc interdicto condemnationis summa refertur ad rei ipsius æstimationem." 1. 3. sec. 11. Dig. (43. 17). Both the interdicts referred to were termed *judicia duplicia*, that is to say, the possessor, as plaintiff, might be condemned as though he

were a defendant, if it were found that he was not entitled to have his possession protected. Mackeldey, p. 259. In these interdicts, however, it was never inquired as to whether the possessor was absolute owner of the thing, and thus he succeeded in retaining his possession when the defendant failed to establish a superior claim. 2. One of the most important consequences of possession was, that out of it might grow absolute ownership, or dominium. By usucapio, long continued possession was turned into legal proprietorship. But the possession must not be *vitiosa*. Ulpianus gives the words of the edict of the prætor, “Quod ait prætor in interdicto: *nec vi, nec clam, nec precario, alter ab altero possidetis*, hoc eo pertinet, ut, si quis possidet vi, aut clam, aut precario, si quidem ab alio, prosit ei possessio, si vero ab adversario suo, non debeat eum propter hoc, quod ab eo possidet, vincere; has enim possessiones non debere proficere, palam est.” 1. 1. sec. 9. Dig. uti pos. (43. 17). Since, thus, by long possession, and by virtue of usucapio, there arises legal ownership, in such cases we have another instance of a “jus possessionis.” 3. The *bona fide* possessor, who holds the thing “rem sibi habendi,” is entitled to the “fructus separati,” and becomes the owner by the fact of possession. As a *bona fide* possessor he could defend his possession against other claimants by means of the actio Publiciana. This action was introduced by the prætor Publicius, and was based upon the fiction of a completed usucapio. It was given to one who, having obtained possession of a thing *ex justa causa*, lost the possession before it matured into ownership by means of usucapio. “Inventa est a prætore actio, in qua dicit is, qui possessionem amisit eam rem se usucepisse, et ita vindicat suam esse. Quæ actio Publiciana appellatur, quoniam primum a Publicio prætore in edicto proposita est.” Jus. iv. 6. sec. 4. When the possessor did not intend to hold the thing for himself, but recognised the ownership of some other person, he was then said to hold the thing in *detention*. In this case there was no juridical possession. The Romans denoted the detainer by such terms as

“habere,” “tenere,” in “*possessione esse*,” and not by the word “*possessio*.”

In relation to the ground upon which any one bases his possession, it was said to be either *justa causa* or *injusta causa*.

In the older law the ground of possession could not be changed at the will of the party, and hence, the maxim “*Nemo sibi ipse causam possessionis mutare potest*.” That is to say, if a man held a thing simply in detention, he could not, by a change in his animus, convert his detention into juridical possession. For this change, the mode in which the possession was commenced was not of importance, provided the person had *ab initio* the “*animus rem sibi possidendi* ;” so that even a thief, if this condition were complied with, might hold in juridical possession. If, however, the usucapio were to run, there must be a *justa causa*; that is to say, the possession must be untainted. It must be “*nec vi, nec clam, nec precario*.”

As to what persons are competent to hold a thing in juridical possession, it may, as a general proposition, be affirmed that all those were fit who were qualified to exercise dominium. In regard to such persons, it was also absolutely necessary that they should have the “*animus rem sibi habendi*.” Hence, those who had no minds of their own were debarred from having legal possession. Thus *infantes*, those children who were under seven years of age, insane persons, and slaves, could never legally possess. Slaves might detain a thing and hold it “*in possessione naturaliter*,” but they could have no legal possession.

Amongst those things which could not become the objects of possession, it is obvious that things which could not be held in private ownership, e.g. “*res extra commercium*” and “*res divini juris*,” could be held in possession by no one. Nor could “*res incorporales*,” nor the parts of a thing, as the separate members of a living animal, unless the animal itself were held in possession. Further, the corporal independent parts of a thing which are so connected

with it that you cannot conceive of the thing without such parts, cannot be held in separate possession. Though if any person acquires the possession of a chariot, as a single and complete thing, there seems to be no reason why he should not *quoad corpus* acquire possession of one of its wheels, since it is quite possible that his mind (*animus*) may be directed towards the wheels, but such an *animus* was not recognisable, since the *corpus* itself, that is to say, the chariot, was presented to the mind not in its parts, but as a whole. Thus the possessor of a thing regarded as a whole is not the possessor of the constituent parts considered as separate and distinct things. This was as a rule of law of especial importance in relation to *usucapio*. It was however, otherwise when a man possessed the part of a thing, and subsequently came into the possession of this part in its connexion with the remaining portion required to constitute the whole thing. The acquisition of the possession depends upon two conditions. First, on the apprehension of the thing itself; this must be a corporal act, in which the person is brought into such relation to the things that there springs up in the mind the consciousness of perfect control or dominium. Secondly, there must be the will (*animus*) on the part of the possessor to hold the thing for himself. A person, it is to be observed, might also come into the legal possession of a thing by representation, and there was a peculiar mode in which possession might be acquired—by what was denominated *constitutum possessorium*. This took place upon the declaration of a juridical possessor, that he would in the future hold a thing, which in the past had been in his own possession, in the name and for the benefit of some other person.

Possession was said to be lost *corpore et animo*, in which case it was not necessary that these two elements should be cumulative. “*Possessio amittitur vel corpore vel animo.*”

We have already spoken of the “*interdictum retinendæ possessionis.*” But there were other possessory interdicts. If a person entitled to the possession was ousted from it, he

could have recourse for his protection to the "interdictum recuperandæ possessionis," and in the case of land to the "interdictum de vi." "Recuperandæ possessionis causa solet interdicti, si quis ex possessione fundi, vel ædium dejectus fuerit. Nam ei proponitur interdictum unde vi, per quod is qui dejecit, cogitur ei restituere possessionem." Instit. 6, de interdic. (4. 15.)

There was also, in Roman law what was denominated "juris quasi possessio." This consisted in the exercise and enjoyment of the servitudes, and of superficies on the property of another person. Possession, in the strict sense, was limited to things corporal, but quasi possession was in point of fact, the exercise of a real right. It was the exercise of a "jus in re aliena," that came in the course of time to occupy the place of the holding of a "corpus sive factum," and this was called "quasi possessio," as contrasted with "vera possessio," or "corporis possessio." The acquisition of a "quasi possession" was made "corpore et animo." The animus, however, was manifested in the exercising of the right, with the intention of obtaining the prescription. A quasi possession was lost by acts done with the intention of opposing the prescriptio (*contrarium actum*). This possession having only a superficial resemblance to "vera possessio" was protected partly by the interdict for the "corporis possessio" in the case where there was a detention of the thing upon which the enjoyment of the right depended, and in the case of "servitutes prædiorum urbanorum" by the special "prætorum interdicta," as, for example, the "interdictum de itinere," the "interdictum de aqua" and the "interdictum de fonte."

50. Unde in rebus mobilibus non facile procedit, ut bona fidei possessori usucapio competat, quia qui alienam rem vendidit et tradidit furtum committit; idemque accidit, etiam si ex alia causa tradatur. Set tamen hoc aliquando aliter se habet. Nam si

50. Whence, in regard to moveables, it does not easily happen that usucapio avails for a *bona fide* possessor. Because he who has sold and delivered up another's property commits a theft and the same holds good; if he have delivered the thing from any

heres rem defuncto commodatam aut locatam *vel* aput eum depositam, existimans eam esse hereditariam, vendiderit aut donaverit, furtum non committit. Item si is ad quem ancillæ usufructus pertinet, partum *etiam* suum esse credens vendiderit aut donaverit, furtum non committit; (z) furtum enim sine affectu furandi non committitur. Aliis quoque modis accidere potest, ut quis sine vitio furti rem alienam ad aliquem transferat et efficiat, ut a possessore usucapiatur.

other cause. But yet it sometimes results otherwise; for, if a thing, lent or leased to the deceased, or deposited with him, has been sold or given away by the heir on the supposition that it was part of the inheritance, he commits no theft; so if the usufructuary of a female slave has sold or given away her child, believing it to be his own, he does not commit a theft; for theft is not committed without a fraudulent intention. It can happen also in other ways, that a man may transfer to another property not his own, without being guilty of theft, and so that the possessor acquires the property in it by *usucapio*.

JUST. II. 6. 6.

(z) The *bona fide* possessor could not be charged with *furtum*, since there could be no theft, as Gaius expresses it in the text, “sine affectu furandi,” or, as it is expressed in another place, “quia furtum ex adfectu consistit.” iii. s. 208. As in this case there was no criminal intent, there was consequently no criminal act.

51. Fundi quoque alieni potest aliquis sine vi possessionem nancisci, quæ vel ex negligentia domini vacet, vel quia dominus sine successore decesserit vel longo tempore afuerit. Nam si ad alium bona fide accipientem transtulerit, poterit usucapere possessor; et quamvis ipse qui vacantem possessionem nactus est, intellegat alienum esse fundum, *tamen* nihil hoc bonæ fidei possessori ad usucapionem nocet, cum improbata sit eorum *sententia* qui putaverint *furtivum* fundum fieri posse.

51. The land which belongs to another may also be possessed without violence: when, for example, the owner permits it to remain vacant through negligence, or if he has died without a successor, or is absent from it for a long period of time; for if it has been conveyed to another person who receives it *bona fide*, this possessor will be able to hold by *usucapio*; and although he who had taken the vacant possession knew it to be the land of another, this shall be no detriment to the *usucapio* of the one who holds it in good faith, since we do not accept the opinion of those who have thought that land can be the object of a theft.

JUST. II. 6. 7.

52. Rursus ex contrario accidit, ut qui sciat alienam rem se possidere usucapiat: velut si rem hereditariam ejus possessionem heres nondum nactus est, aliquis possederit; nam ei concessum est *usucapere*, si modo ea res est quæ recipit usucapionem. Quæ species possessionis et usucapionis pro herede vocatur.

53. Et in tantum hæc usucapio concessa est, ut et res quæ solo continentur anno usucapiantur.

54. Quare autem etiam hoc casu soli rerum annua constituta sit usucapio, illa ratio est, quod olim rerum hereditariorum possessione velut ipsæ hereditates usucapi credebantur, scilicet anno. Lex enim XII tabularum soli quidem res biennio usucapi jussit, ceteras vero anno. Ergo hereditas in ceteris rebus videbatur esse, quia soli non est, quia neque corporalis est: et quamvis postea creditum sit ipsas hereditates usucapi non posse, tamen in omnibus rebus hereditariis, etiam quæ solo tenentur, annua usucapio remansit.

55. Quare autem omnino tam improba possessio et usucapio concessa

52. Again, on the other hand, it happens, that he who knowingly possesses the property of another, may yet hold by *usucapio*, as for example, if any one takes possession of an inheritance (*hereditas*) of which the heir has not yet obtained the possession, for *usucapio* is conceded to him, provided the things received are capable of *usucapio*; this kind of possession and *usucapio* is called *pro herede*.

53. And this *usucapio* has been admitted to such extent, that even immoveables, (*res quæ solo continentur*) may be held by *usucapio* after the space of a year.

54. But the reason why in this case *usucapio* has been established for immoveables, held for the space of a year, is because it was formerly thought that the *res hereditariæ*, as well as the *hereditas* itself, might be held by *usucapio*, that is to say, by possession for a year. For the law of the Twelve Tables has indeed prescribed for land a period of two years, but, on the other hand, for all other things the period of *usucapio* was one year only. Therefore, the *hereditas* appeared to be included among the other things, because it does not attach to the soil, nor is it even a corporal thing; and although subsequently it has been received that the *hereditas* itself cannot be held by *usucapio*; still *usucapio* in one year has remained, as far as regards all *res hereditariæ*, including those appertaining to the land.

55. But the reason why, under any circumstances, this *usucapio* and pos-

sit, illa ratio est, quod voluerunt veteres maturius hereditates adiri, ut essent qui sacra facerent, quorum illis temporibus summa observatio fuit, et ut creditores haberent a quo suum consequerentur.

session have been admitted, though in themselves inequitable, is because our ancestors wished the *hereditas* to be entered upon as quickly as possible, that there might be persons to perform the sacred rites, the observance of which was of the highest importance at that period, and that the creditors might have some one against whom to prosecute their claims.

56. Hæc autem species possessionis et usucapionis etiam lucrative vocatur: nam sciens quisque rem alienam lucrificat. (a)

56. But this species of possession and *usucapio* is also called *lucrativa*: for every one makes a gain knowingly when he possesses the property of another.

(a) If an owner mancipated his property or ceded it in jure "*fiduciæ causa*," that is, with an agreement for future remancipation, as he might be induced to do, for the purpose of safe keeping, or as a pledge, in such cases he could by means of possession during one year, even if the pledge were land, re-acquire the ownership, just as though the thing had been remancipated to him. If, in the case of a pledge, the creditor had not been satisfied, but the pledgor obtained possession of the thing, not however by hiring, nor as a *precarium*, that is by a permissive possession, the owner retaining his right to demand the possession of his property when he pleased, in such a case a *usucapio* without a *titulus* might be effected, which was called a "*lucrativa usucapio*." "*Precarium est, dum prece creditor rogatur, permitti debitorem in possessione fundi sibi obligati demorari et ex eo fructus capere.*" See sec. 60; and Isidor. orig. V. 27. 17.

57. Sed hoc tempore etiam non est lucrative. Nam ex auctoritate Hadriani senatus-consultum factum est, ut tales usucapiones revocarentur; et ideo potest heres ab eo qui rem usucepit, hereditatem petendo perinde eam rem consequi, atque si usucapta non esset.

57. But at the present time this *usucapio lucrative* no longer exists; for by the authority of Hadrian, a senatus-consultum decided that such kinds of *usucapio* should be revoked; and therefore the heir can seek by means of the *petitio hereditatis*, the thing from them who have it in *usucapio*, as if there had been no *usucapio*.

58. Et necessario tamen herede extante ipso jure pro herede usucapi potest.

58. And even during the existence of the *heres necessarius*, a person may become *heres* by *usucapio* in his own right in the place of the heir.

59. Adhuc etiam ex aliis causis sciens quisque rem alienam usucapit. Nam qui rem alicui fiduciæ causa mancipio dederit vel in jure cesserit si eandem ipse possederit, potest usucapere, anno scilicet, etiam soli si sit. Quæ species usucapionis dicitur usureceptio, quia id quod aliquando habuimus recipimus per usucapionem.

59. Still a person can knowingly from other causes, acquire the property of another by *usucapio*. For he who has given his property (*rem*) in *mancipium*, with a fiduciary condition, to another, or has ceded it in *jure*, can hold it by *usucapio*, if he has held it for the space of a year, also if it be land. This kind of *usucapio* is called *usureceptio*, since we take again that which we formerly possessed by means of *usucapio*.

60. Sed cum fiducia contrahitur (b) aut cum creditore pignoris jure, aut cum amico, quod tutius nostræ res apud eum essent, si quidem cum amico contracta sit fiducia, sane omni modo competit usus receptio; si vero cum creditore, soluta quidem pecunia omni modo competit, nondum vero soluta ita demum competit, si neque conduxerit eam rem a creditore debitor, neque precario rogaverit, ut eam rem possidere liceret; quo casu lucrativa usucapio competit.

60. But a fiduciary contract is made, either with a creditor as a security (*jure pignoris*) or with a friend, that our property may be in greater safety with him. If the fiduciary contract is made with a friend, then indeed *usureceptio* applies in every case; but if it be with a creditor, it applies always when payment is made; but if your debt is not paid, it only applies if the debtor has neither hired his property from the creditor, nor begged by petition to be permitted to possess the thing; in this case the *lucrative usucapio* applied.

(b) *Fiducia contrahitur aut cum creditore pignoris jure, etc.* In the old law the only form of pledge was the *pignus*, which was a thing given to a man as security for a debt or a demand. At a later period of the law there arose the *hypotheca*, in which a pledge was not given, but a written security instead. Mutual rights arose out of the transaction which

constituted a *pignus*. The creditor was entitled to his money, or to whatever he might have given for the *pignus*, and upon solutio, the mortgagor was entitled to his pledge. Every act of pawning was said to be *fiducia*, and the agreement also for remancipation was said to be *fiducia*, whilst the parties to it were said *fiduciam contrahere*. Every species of property which could be mancipated or ceded *in jure*, not merely *things*, but even children, if their father had them under his *potestas*, might be the object of a *pignus*. See Liv. ii. 24. Paul. Sent. v. 1. 1. 1. Cod. de patrib. qui fil. (4. 43). Nov. 134. c. 7. Puchta's Inst. ii. 731, 732.

61. Item si rem obligatam sibi populus vendiderit, eamque dominus possederit, concessa est usus receptio: sed hoc casu prædium biennio usu recipitur. Et hoc est quod volgo dicitur ex prædiatura possessionem usurecipi. Nam qui mercatur a populo prædiator appellatur. (c)

61. Also, if the *populus* have sold a thing pledged by an obligation to itself, and if the owner become the possessor, *usureceptio* is conceded, but in this case by possession of the thing pledged for two years. And this is what is commonly called the recovery of possession *ex prædiatura*. For the person who thus buys from the *populus* is called *prædiator*.

(c) *Nam qui mercatur a populo, prædiator appellatur.* Gaius here observes that a *prædiator* is one who buys from the people, and it appears from the context that the thing bought was called a *prædium*—a thing pledged to the people (*res obligata populo*). The goods of a *præs* were named *prædia*, and a *præs*, according to Varro and Festus, was a bondsman or surety in the case of government contracts, or, according to Asconius, a surety who pledged himself for the preservation or safety of property in litigation. Cic. ad Ver. 2. Act. 1. 45. Gai. iv. 16. 94. *Prædia sunt res ipsæ; prædes homines, id est fidejussores, quorum res bona prædia (non) suo nomine dicuntur* Varro de Ling. Lat. v. 40. It appears from Gaius, that if the state sold pledged land, and

the purchaser who was called the *prædior* did not use his right for two years, but allowed the former owner to remain in his possession, in such a case the latter re-acquired the ownership. This was denominated “*usureptio ex prædiatura*.” As the *prædiator* possessed only a *prædium*, the term for *usucapio* was two years, being the same required for a *fundus*. Huschke has discussed the *usucapio pro herede*, *fiduciæ* and *ex prædiatura* in the *Zeitschr. für gesch. Rechtswiss* xiv. Num. 7. (1848) See also Puchta’s *Instit.* vol. ii. 659, 660.

62. *Accidit aliquando, ut qui dominus sit alienandæ rei potestatem non habeat, et qui dominus non sit alienare possit. (d)*

62. It sometimes happens that he who is the owner has not the power of alienating the thing, and he who is not the owner can.

JUST. ii. 8. pr.

(*d*) As a general principle, the person who is the proprietor of a thing has the power to alienate it, and on the contrary, he who is not the proprietor has no power of alienation. There are, however, some exceptions to this rule, to which Gaius directs the attention of the student. See secs. 63, 64, 80, 81, 82.

63. *Nam dotale prædium maritus invita muliere per legem Juliam prohibetur alienare, quamvis ipsius sit vel mancipatum ei dotis causa vel in jure cessum vel usucaptum. Quod quidem jus utrum ad Italica tantum prædia, an etiam ad provincialia pertineat, dubitatur.*

63. For the husband is, by the *lex Julia*, prohibited from alienating such immoveables as form part of his wife’s dowry without her consent, although they belong to him, having become his either by mancipation as part of the dowry, or ceded *in jure*, or by *usucapio*. But it is doubted whether this right belongs only to immoveables in Italy, or also extends to those in the provinces.

JUST. ii. 8. pr.

64. Ex diverso agnatus furiosi curator rem furiosi alienare potest ex lege XII tabularum; item procurator, *id est cui libera administratio permissa est*; item creditor pignus ex pactione, quamvis ejus ea res non sit. Sed hoc forsitan ideo videatur fieri, quod voluntate debitoris intelligitur, pignus alienari, qui olim pactus est, ut liceret creditori pignus vendere, si pecunia non solvatur.

64. On the other hand, the *agnatus* as curator of an insane person has power to alienate his property by the law of the XII Tables; the same is the case with the procurator, that is, the person to whom is committed unfettered control over the property. The creditor also can alienate property deposited with him as a pledge (*pignus*) on the ground of the contract, although the thing be not his. But this alienation may perhaps be considered as taking place with the consent of the debtor, who had formerly agreed that the creditor might sell the thing pledged if the money due were not paid.

JUST. ii. 8. 1.

65. Ergo ex his quæ diximus adparet quædam naturali jure alienari; qualia sunt ea quæ traditione alienantur; quædam civili, nam mancipationis et in jure cessionis et usucapionis jus proprium est civium Romanorum.

65. Therefore, from what we have said, it appears that certain things can be alienated according to natural law, such as those which are alienated by tradition; others according to the civil law, for the rights of *mancipatio*, and of *in jure cessio*, and of *usucapio*, are peculiar to the Roman people.

JUST. ii. 1. 11.

66. Nec tamen ea tantum quæ traditione nostra fiunt naturali nobis ratione adquiruntur, sed etiam quæ occupando ideo *adquisierimus*, quia antea nullius essent: (e) qualia sunt omnia quæ terra, mari, cælo capiuntur. (f)

66. But not only are those things which become ours by tradition acquired by natural right, but also those which we have made our own by occupation, (f) since, till the moment of our acquisition, they were the property of no one (*res nullius*). To this class belong all things that are captured on the earth, and in the sea, and in the air.

JUST. ii. 1. 12.

(e) Huschke says that in the lacuna the following appears to have been written: "Sed etiam, quæ occupando ideo nostra fecerimus, qui antea nullius essent." At least, this reading corresponds with the style of Gaius, and for the

most part with the visible marks in the MS. Gneist, whose text we have adopted, does not follow the reading of Huschke.

(f) We have already explained the nature of “*traditio*,” and our remarks in this note must be confined to “*occupatio*.” The general theory of *occupatio* is singularly simple. When a person takes legal possession of a *res nullius in commercio*, from that very instant he acquires a property in it; but the thing occupied must be *in commercio*, and it must also be a *res nullius*. It may be something thrown away by the former owner, or it may be a thing which no human hand has ever touched. The things that may be thus held by *occupatio* are various, e.g., the products of nature, all wild animals, metals in the earth, and pearls in the deep.

One mode of apprehension is by *venatio*, or hunting. When a man caught a wild animal, either on his own land or the land of another person, he became at once the owner, even though he might have caught it upon land upon which he was a trespasser. The owner into whose close he had broken might have an action against him for the injury, but the property caught was in the legal possession of the hunter. If a man has only wounded a wild animal in the chase, so that it lies bleeding and dying, and cannot escape, it is not in his *occupatio*, unless he hold it *in manibus suis* or unless his dog bear it in his mouth.

A peculiar kind of *occupatio* was that termed *thesauri inventio*. By this was understood the acquisition of moveables which had been so long concealed that it was impossible to discover the previous owner. Whether the things discovered had been intentionally concealed in order to secure them from thieves or from enemies, or had become hidden by natural events, made no difference. All the treasure found in Herculaneum and Pompeii is, as we term it, “treasure trove,” though it might have been forsaken by its terrified owners, or buried with the hope of future recovery. Paulus says, “*Thesaurus est vetus quedam depositio pecuniæ cuius*

non exstat memoria, ut jam dominum non habeat. Sic enim fit ejus qui invenerit, quod non alterius sit." l. 31. s. 1. de acq. rer. dom. (4l. 1.) When property was found in the land of another person, as, for instance, by the gardener of the owner digging in his master's land, if the search were made intentionally, the treasure found went entirely to the owner of the land; but if it happened to be discovered by chance, then one-half went to the finder, and the other half to the owner of the land.

Another kind of *occupatio* was termed *specificatio*. When a person so changed a thing belonging to another person that he created as it were a new substance, this was what the Romans understood by specification. As for example, if a man made cloth out of another's wool, or linen from his flax, or wine out of his grapes, or built a ship from his wood, it was held that an entirely new thing was created, which the law affirmed might be occupied as a *res nullius*. Gaius says, "Cum quis ex aliena materia speciem aliquam suo nomine fecerit. Nerva et Proculus putant, hunc dominum esse, qui fecerit, quia, quod factum est, antea nullius fuerat." l. 7. s. 7. Dig. tit. cit. (4l. 1.) There must, however, be a complete change in the thing, as the threshing out of wheat, for instance, was held to be no specification. There was a dispute between the two great schools of jurists about specification. The Sabinians said that when a man made a new article out of another's materials, he did so not for his own benefit, but for that of the owner. "Cujus est materies ejus est species." The Proculians objected, and affirmed that the thing formerly in existence was destroyed, and that a new one was created, which was a *res nullius* in no one's occupation, until taken into the possession of the specifier. A middle view subsequently arose, in which it was held that if *all the essentials* of the thing remained unchanged, so that it might be reduced into its former state, then the new thing belonged to the owner of the materials out of which it was made; but if this reduction could not take place, then it was held that there was a *nova species*, and that as a

res nullius it was in the possession of the specifier. “Et post multam Sabinianorum et Proculianorum ambiguitatem placuit media sententia existimantium, si ea species ad priorem et rudem materiam reduci possit eum videri dominum esse, qui materiæ dominus fuerit: si non possit reduci, eum potius intelligi dominum, qui fecerit.” Instit. s. 25. de rerum divis. (2. 1).

The last species of *occupatio* to which attention must be called is that which is termed *occupatio bellica*. The Roman law proceeded upon this principle, that as soon as war broke out—not, however, a civil war, but an international war, then from that moment the person of the enemy was stripped of all the previous rights which he possessed; and his chattels became a *res nullius*, and whoever found them might by occupation obtain the legal ownership. This principle was indeed taken in the most extensive application. Thus, it was not merely the armed soldier who was bereft of his rights, but every single citizen of the hostile state; and any article of property belonging to him might be taken and appropriated by the victorious enemy as his own. Such was the extreme harshness of the old Roman law of war. Severe, however, as this law was, the Romans were quite consistent in maintaining it, for they adhered to the doctrine not only as applicable to the enemy but as binding on themselves. So that if property were taken by an enemy from a Roman, and if afterwards it were captured by another Roman citizen, the original owner had neither right of property nor right of possession; and he had no *jus vindicandi* to recover his captured property. It was indeed only a few things that reverted at the close of a war by the “*jus postliminium*” to their former condition and ownership. The Roman citizen, when he escaped from captivity, ceased to be a slave, and at once became again a *civis Romanus*, and as such he returned to his former status. This was the principal case, though not the only one, of reversion to the condition held previous to the outbreak of war. Land, ships of burden, and servitudes, were also re-

stored by the “*jus postliminium*” to their former owners. Weapons of war, when captured, as already observed, however valuable, were lost to their original owners for ever. Modern international law does not extend the principle of capture to peaceable citizens, and the man who seizes upon the private property of an enemy is a “thief and a robber.” Still, even now, what the soldier takes in war, is held by him as a *res nullius* or as a thing in no legal occupation.

67. Itaque si feram bestiam aut volucrem aut piscem ceperimus, (g) *quidquid ita captum fuerit, id statim nostrum fit et eo usque nostrum esse intellegitur, donec nostra custodia coerceatur. Cum vero custodiam nostram evaserit et in naturalem libertatem se receperit, rursus occupantis fit, quia nostrum esse desinit. Naturalem autem libertatem recipere videtur, cum aut oculos nostros evaserit, aut licet in conspectu sit nostra, difficilis tamen ejus rei persecutio sit.*

67. Thus, if we have caught a wild beast, or a wild fowl, or a fish, that which we have thus caught immediately becomes our own, and it is acknowledged to be ours so long as it is retained in our power. But when it has escaped our control, and has recovered its natural freedom, it again becomes the property of the person who takes it, since it has ceased to be ours. It appears to have regained its natural freedom, either when it has escaped beyond our sight, or, being still within our view, its pursuit has become difficult.

JUST. II. 1. 12.

(g) The lacuna in this section is completed by Huschke as follows: “Itaque si feram bestiam aut volucrem aut piscem cepimus. (ceperimus) simul atq. (atque) captum hoc animal est, ptinus. (protinus) nostr. fit et eousque, etc.” Upon the word *protinus*, as used in Gaius, Huschke says, compare ii. 153. iv. 185, and for the application of this idea, see Paulus, l. 1. sec. 1. Dig. de acquir. poss. (41. 2). The word *captum*, Huschke thinks, should be connected with the word *animal*, as is plain from the commencement of the following section: “In iis autem animalibus, etc.” Neither Gneist, in the text, nor Boecking in the Bonn edition, has followed the conjecture of Huschke. Lachmann says, “Sententia plana est, si, etc. piscem ceperimus, quidquid ita captum fuerit id statim nostrum fit, eousque, etc.”

68. In iis autem animalibus quæ ex consuetudine abire et redire solent, veluti columbis et apibus, item cervis qui in silvas ire et redire solent, talem habemus regulam traditam, ut si revertendi animum habere desierint, etiam nostra esse desinant et fiant occupantium. Revertendi autem animum videntur desinere habere, cum revertendi consuetudinem deseruerint.

69. Ea quoque quæ ex hostibus capiuntur naturali ratione nostra fiunt. (*h*)

68. But with regard to those animals which are accustomed to go in and out, as is the case with doves and bees, and with deer which are accustomed to wander in and out of the forest, we hold the well-established rule, that when they have lost the instinct of returning, they cease to be our property, and become the property of the first occupier. Now they are deemed to have lost this instinct when they have lost the habit of returning.

69. Property captured from the enemy becomes ours by natural right.

JUST. II. 1. 15 et 17.

(*h*) In regard to property taken from the enemy, a distinction must be made not referred to in the text. Immoveables did not become the property of the occupier, but belonged to the state, a rule of international law still of importance. Pomponius says, "Verum est, expulsis hostibus ex agris, quos ceperint, dominia eorum ad priores dominos redire nec aut publicari, aut prædæ loco cedere; publicatur enim ille ager, qui ex hostibus captus sit." l. 20. s. 1. de capt. (49. 15.) It was only moveable things of which the possessor became exclusive owner, a rule which must of necessity admit of some modification, when several persons had contributed by their joint exertions to the capture. See Polybius, lib. x. Domenget, 164.

70. Sed et id quod per alluvionem nobis adicitur eodem jure nostrum fit. Per alluvionem autem id videtur adici quod ita paulatim flumen agro nostro adicit, ut æstimare non possumus quantum quoquo momento temporis adiciatur. Hoc est quod volgo dicitur, per adluvionem id adici videri quod ita paulatim adicitur, ut oculos nostros fallat.

70. Moreover, that which is added to our land by alluvium becomes our property by the same right. Now, that is considered as added through alluvium which the river adds to our land little by little, so that we cannot determine how much is added in any moment of time. This is equivalent to the common saying that a thing seems to be added *per adluvionem*, which is added so gradually that its addition escapes our notice.

71. Quod si flumen partem aliquam ex tuo prædio detraxerit et ad meum prædium attulerit, hæc pars tua manet.

71. So that if a river has separated a specific portion of your land, and added it to my land, the former remains part of your property.

72. At si in medio flumine insula nata sit, hæc eorum omnium communis est qui ab utraque parte fluminis prope ripam prædia possident. Si vero non sit in medio flumine, ad eos pertinet qui ab ea parte quæ proxima est juxta ripam prædia habent. (i)

72. But if an island is formed in the midst of a stream, it is the common property of all those who own the land along both banks of the river. But if it be not in the middle of the river, it belongs to those who hold the land on the bank nearest to it.

JUST. II. 1. 20, 21 et 22.

(i) Gaius does not mention the mode of acquisition called *adjudicatio*, of which Justinian speaks in his Second Institutes. It was not, as some supposed, in the power of a judge by his verdict *ex cathedra* to make a man an owner. But if a person, by the vindicatio, sought to recover property of which he was in point of fact not the owner, and if the judge, after causæ cognitio, pronounced him to be the dominus, then he was said to acquire the ownership "*per adjudicationem*." The maxim that embodies this doctrine is the following: "*Res judicata inter partes jus facit*." Not, it is to be observed, "*inter omnes*," but "*inter partes*." Gaius, though not touching on this mode of acquisition, directs the attention of the student to the different modes of acquiring property by Accession. This was deemed a subject of great importance with the Romans, and the principles established in Roman law have still an important practical bearing.

An accession was said to take place when a thing belonging to one person came into physical coherence with the property of another, in such a manner that by their union one independent thing was formed; in which case the owner of the principal thing became the owner of the new thing which had come into existence. The "*res principalis*" was said to attract to it the "*res accessoria*," or, as Ulpianus expresses it, "*Accessio cedit principali*." l. 19. sec. 13. Dig. de auro (34. 2). Thus, the Romans said, "*Ædi-*

ficium cedit solo," that is to say, the owner of the land became the owner of all the buildings reared upon it. It mattered not who had erected the building, nor whether it were a mansion or a hut; it was just the same to the owner of the land; "*Quia semper ædificia cedit solo:*" or as it was expressed in other words, "*Ædificia sequitur solum.*" Nor was it of consequence whether the act had been done *fortuita causa* or intentionally, the owner of the land was entitled to all that might be erected upon it. It was, as must be obvious, of great importance to determine which was the principal thing and which was the accession; and this decision was not unattended with difficulty. No greater mistake could be made than for any one to suppose that this could be decided by ascertaining simply the money value of the things. The principal thing in every case was that which was regarded as the necessary condition for the existence of the other. The thing imposing, as it were, conditions upon the other thing, was held to be the principal thing; whilst the thing conditioned, or submitting to the condition, was held to be the accessory thing. For example, a house cannot exist apart from the land on which it stands. Thus, the value of the house made no difference. It might have been a palace, and a thousand times more valuable than the site of land on which it was built. Again, when two things were combined or united, and but one of them was serviceable, then the thing which was serviceable was held to be without doubt the principal thing. It was the thing which was serviceable and which realized, so to speak, the aim of the other. The blade of the sword, for instance, is the principal thing, although the hilt may be of gold, and sparkle with richest jewels. Again, where the union was of such a nature that a severance could not be made without the destruction of the substance, then the acquisition was regarded as made *in perpetuum*. But when the *adjunctio* was of such a nature that the accessory thing might be separated without the destruction of the substance, ownership was acquired, and the owner of the acces-

sory thing might employ the “*actio ad exhibendum*,” by which means he would secure the separation of the thing he had previously owned, and afterwards by the “*rei vindicatio*,” he could obtain possession of his property. There are three principal classes of accession: 1. Immoveables with Immoveables; 2. Moveables with Immoveables; 3. Moveables with Moveables.

First, we will take the case of Immoveables with Immoveables. Under this head four species may be mentioned, namely, *alluvio*, *avulsio*, *alveus derelictus*, and *insula nata*. Of these four, *alluvio* was the most simple. It was applied to the sediment deposited by a stream flowing along the margin of a man's land, which by deposition gave rise to so slow an increase that it was imperceptible to the senses; such increase the owner of the land was entitled to claim as his property. The reverse, however, was the case in *avulsio*; for when by the force of the stream (*vi fluminis*) the land of one person was separated, and attached itself to the land of another person, there did not arise an immediate acquisition. The detached land still continued the property of the owner of the soil from which it was driven. But so soon as the mass of land that had been floated off coalesced with the land of another owner, and grew to it so firmly that it became an organic whole, from that moment it became the property of the person to whose land it had become closely and permanently attached. Thus, in accordance with this principle, when plants or trees took root, as it was expressed, and grew, they became the property of the owner of the soil: secs. 29, 31, 33 and 34, Jus. de rer. div. (2. 1.) l. 16. Dig. de adq. rer. dom. (41. 3.) Another mode of accession was by means of what was denominated *alveus derelictus*. This arose when a river forsook its bed, and flowed into an entirely new channel. The bed in which the river was accustomed to flow, as already observed, was a *res publica*, but when the stream had permanently forsaken its channel the former became a *res privata*, and belonged to the proprietors of the land on each side. The owners

divided it “pro latitudine fundi,” not “pro magnitudine,” that is to say, according to the length of the shore owned by each. “Qui prope ripam ejus prædia possident, pro modo scilicet latitudinis cujusque agri, quæ latitudo prope ripam sit.” ss. 18—21 Instit de rer. div. (2. 1.) Thus, the owner of a small tract of land might take much more than the owner of a larger tract, if he owned more on the margin or river line of the original stream. But this mode of ownership could never arise as the result of a temporary flood; for in order to constitute an *alveus derelictus* the stream must have permanently forsaken its bed and formed an entirely new one.

We have yet to speak of what the civilians denominate *insula nata*. It is much the same, as will be observed on consideration, whether the water forsakes its bed or the bed, forsaking the water, rises above the stream, and so forms new land. As soon as the bed of a river rises to the surface, either by slow accretion or by some force which elevates it to the surface, the same principle applies as that which determines the ownership of an *alveus derelictus*. The adjoining owners become possessors of the island. It is, however, only those islands which are formed by the rising of the bed of the river that can thus be owned. A piece of land may be cut off from the main land by the action of the current working round it, so isolating it, and in this manner forming an island; but this was not what was understood by an *insula nata*. Nor did the principle apply to *floating* islands, but simply and strictly to what were denominated *insula nata*. To determine the amount that the adjoining owners should take, we must suppose an imaginary line to be drawn through the middle of the stream, and the portion which falls on one side would be assigned to the owner of the adjacent land on that side, while the portion falling on the other side of the line went to the owners of the land on that bank. Thus one party with an equal river line might take a larger share than another. “*Insula, quæ in mari nata est, quod raro accidit, occupantis fit*;

nullius enim esse creditur. At in flumine nata quod frequenter accidit, si quidem mediam partem fluminis teneat, communis est eorum qui ab utraque parte fluminis prope ripam prædia possident, pro modo latitudinis cujusque fundi, quæ latitudo prope ripam sit. Quod si alteri parti proximior sit, eorum est tantum, qui ab ea parte prope ripam prædia possident.” Jus. ii. l. 22.

The second head of our classification is that of Moveables to Immoveables. There are three species to be mentioned under this division: *inædificatio*, *satio*, and *plantatio*. As far as regards *inædificatio*, it has been already observed that the rule of the Roman law was “*Ædificium semper solo cedit*.” The owner of the land became at once legally the owner of the buildings reared upon it. The materials with which the house was built might have belonged to a third party, or to the builder, but when compacted and reared into a structure on another man’s land, the proprietorship was transferred to the owner of the land. Whether the builder or the owner of the materials had a right to compensation on the ground of an obligation, was quite another matter. “*Cum in suo solo aliquis aliena materia ædificaverit, ipse dominus esse intelligitur ædificii, quia omne, quod inædificatur, solo cedit*.” Inst. lib. cit. *Plantatio* was a term applied to those things which were planted in land belonging to another person. The owner of the land was held to be the legal owner of that which any one planted in it. If a man had once planted, and came afterwards and rooted the thing out and carried it away, he was regarded as guilty of *furtum* or theft. Even if the thing planted had been stolen, it could not be removed, for it belonged to the owner of the land in which it was placed. *Plantatio*, however, does not mature the moment the sapling is placed in the ground. But it is perfected from the very moment that the plant has taken root. *Satio* was another mode of making an acquisition, and it was applied to every kind of seed. The very moment, however the seed was shed into the earth it became the property of the owner of the land.

Under the term "seed" was included not only seed in the common acceptation of the word, as wheat, clover, and the smaller kinds of grain, but also beans and peas.

The third class to be mentioned is that of the accession of Moveable things to Moveables. Of these may be mentioned *pictura*, *scriptura* and *adjunctio*. *Pictura* and *scriptura* were treated by the Roman jurists as almost identical things, and the rule of law which regulated them was the following: "*Pictura et scriptura semper cedunt tabulæ.*" In reciting the law upon this subject, Justinian says, "*Litteræ quoque licet auræ sint, perinde chartis membranisque cedunt.*" Ins. lib. cit. The reason of this was that the *tabula* was considered as the principal thing, for it was said that neither a picture nor a manuscript could exist without the *tabula* upon which it was painted or the parchment upon which it was written. This rule was modified by Justinian, as he held it to be ridiculous that a picture, perhaps equal to one painted by Apelles, should be an accessory to the board upon which it was painted. Hence, in this case, which was exceptional, the picture came to be treated as the principal thing, but the painter was bound to recompense the owner of the tablet on which he had painted. "*Si quis in aliena tabula pinxerit, quidam putant, tabulam picturæ cedere, aliis videtur pictura, qualiscunque sit tabulæ cedere. Ridiculum est enim, picturam Apellis vel Parrhasi in accessionem villissimæ tabulæ cedere.*" Jus. lib. cit. *Adjunctio* took place when two moveable things belonging to two different owners became united into one thing. The owner of the one which previous to the union was regarded as manifestly the principal thing, became *ipso jure* the owner of the new thing, no matter by whom the *adjunctio* was made. If the *adjunctio* originated with the owner of the accessory thing, he would lose the ownership in his property. There were two kinds of *adjunctio*, "*adplumbatio*" and "*adferruminatio.*" The former term was applied when two metals were soldered or brazed together. This gave rise only to a transitive ownership, for when the parts were

separated, the owner who had been deprived could vindicate his property. The unsoldering, for instance, created a *res integra*, and in this way a man's right might revive. The same principle applied to things woven or sewn together. But when two metals were melted and flowed together, so as to make one mass—as when tin and lead were molten together to make solder—then *adferruminatio* took place, and such a commixture gave rise to a perpetual ownership, for the owner of the principal thing took the whole. l. 16. Dig. de acq. rer. dom. (41. 1.) l. 23. secs. 5. 6. Dig. de rei. vind. (6. 1.) l. 5. p. s. l. Dig. ead. l. 31. s. 1. Dig. tit. cit. (41. 1.) Scheurl's Instit. pp. 169, 170, 171; Marezoll's Instit. s. 96.

73. Præterea id quod in solo nostro ab aliquo ædificatum est, quamvis ille suo nomine ædificaverit, jure naturali nostrum fit, quia superficies solo cedit.

73. Moreover, that which any person has built on our land, even though he have built it for himself, becomes our property by natural law, because that which is added to the surface attaches to the land.

JUST. II. 1. 30.

74. Multoque magis id accidit et in planta quam quis in solo nostro posuerit, si modo radicibus terram complexa fuerit.

74. For a stronger reason this is the case as regards any plant which a person has placed on our land, if so be that it has taken root.

75. Idem contingit et in frumento quod in solo nostro ab aliquo satum fuerit.

75. The same happens also in the case of grain which any one has sown in our land.

76. Sed si ab eo petamus fructum (j) vel ædificium, et impensas in ædificium vel in seminaria vel in semen-tem factas ei solvere nolumus, poterit nos per exceptionem doli repellere; utique si bonæ fidei possessor fuerit.

76. But if we claim from him the fruit, or the building, and are unwilling to pay the expenses incurred in building, or planting or sowing, he will be able to resist our claim by the *exceptio doli*, at all events if he has been a *bona fide* possessor.

JUST. II. 1. 31 et 32.

(j) *Sed si ab eo petamus fructum.* Huschke says that, as the introduction of this extract is worded, one might quote it as an argument that although the *bona fide* possessor

became owner of the fruits, the owner of the land could vindicate the fruits arising from it; indeed, one might from this reading maintain the erroneous doctrine that the bona fide possessor had no right of property in the “fructus separati,” but acquired only a bona fide possession. **Fructum**, he thinks, is manifestly a wrong reading for “fundum.” Gaius has said, in sec. 73, that what any person has built upon our land becomes our property by natural right, and in sec. 74 that still much more the same holds good of a plant which becomes rooted in our land; in sec. 75 he speaks in relation to the grain that is sown upon it. He now adds the restriction that nevertheless the bona fide possessor of the principal thing in both cases—of the growing plants in a field, and of the building erected in a town—on account of the expense incurred on the building (sec. 73), the orchard (sec. 74), or the sowing (sec. 75), can, by the “doli exceptio,” rebut the vindicating owner, who will not reimburse him.

Gaius presents herein the first place the two principal cases, because he has already, in citing the second instance, said of them “multoque magis id accidit.” What then could he in this place present as the principal thing possessed and vindicated? If we regard connection of ideas, land in the country or houses in the town would be mentioned. These two also stand elsewhere (for example in Gaius ii. 42. iv. 17. 149. 150. 160) always in collocation, and what is of most importance, also in the parallel passages to be found (l. 7. s. 12. 13. l. 9. pr. Dig. de acquir. rer. dom. (41. 1). s. 32. J. de rer. divis. (2. 1.) In some instances *ædificium* and *fundus* are denominated as the principal things to be possessed and vindicated. Compare also Epit. ii. 1. s. 6, where both are comprised in the expression *terra* and *res facta*.

77. Eadem ratione probatum est, quod in chartulis sive membranis meis aliquis scripserit, licet aureis litteris, meum esse, quia litterae chartulis sive membranis cedunt.

77. It is acknowledged, in accordance with the same principle, that if any one has written on my paper or parchment, even with golden letters, it continues to be mine,

Itaque si ego eos libros easque membranas petam, nec impensam scripturæ solvam per exceptionem doli mali summoveri potero.

because the letters are an accession to the paper or parchment. Therefore if I claim these books and these parchments, but am unwilling to pay the expense of the writing thereon, my claim may be resisted by means of the *exceptio doli mali*.

JUST. ii. 1. 33

78. Sed si in tabula mea aliquis pinxerit velut imaginem, contra probatur: magis enim dicitur tabulam picturæ cedere. Cujus diversitatis vix idonea ratio redditur. Certe secundum hanc regulam si me possidente petas imaginem tuam esse, nec solvas pretium tabulæ, poteris per exceptionem doli mali summoveri. At si tu possideas, consequens est, ut utilis mihi actio adversum te dari debeat: quo casu nisi solvam impensam picturæ, poteris me per exceptionem doli mali repellere, utique si bona fide possessor fueris. Illud palam est, quod sive tu subripuisses tabulam sive alius, competit mihi furti actio. (k)

78. But if any one has painted on my tablet, for example a picture, the opposite principle is recognised, for in this case the tablet accedes to the picture; a distinction for which scarcely a satisfactory reason can be given. According to this rule, if you claim as yours a picture which I possess, and refuse to pay the price of the tablet, you can be resisted by means of the *doli mali exceptio*. But if you are the possessor the result is that an *actio utilis* should be granted me against you, and in this case, unless I pay the cost of the picture, you can resist my claim by means of the *exceptio doli mali*, at least if you are a bona fide possessor. It is clear that if you or another have stolen the tablet, I have against you an action for theft (*actio furti*).

JUST. ii. 1. 34.

(k) The general consideration of exceptions must be reserved for the fourth book of these commentaries, in which Gaius treats fully of the Actio. See, however, sec. iv. 115 et seq. An exception was a plea brought forward by the defendant in an action alleging some special matter of fact, the effect of which was either partly or entirely to rebut the suit of the plaintiff. Thus Ulpianus says, "*Exceptio dicta est quasi quædam exclusio, quæ inter opponi actioni cujusque rei solet ad excludendum id, quod in intentionem condemnationemve deductum est.*" l. 2. pr. Dig. de excep. (44. 1.) Paulus says, "*Exceptio est conditio, quæ modo eximit reum*

damnatione, modo minuit damnationem." l. 22. pr. Dig. tit. cit. Gaius himself explains the "*exceptio doli mali*," when he states that a man may be liable *jure civile* under a stipulation, but that it may be *iniquum* to hold him to his contract; and that in such a case the court would give relief. He says, "*Sed quia iniquum est te eo nomine condemnari placet per exceptionem doli mali te defendi debere.*" lib. iv. s. 116. The *exceptio* proceeded from the defendant, but was inserted in the formula, and ran thus: "*Si in ea re nihil dolo malo Auli Agerii factum sit neque fiat.*" *Exceptions* were applicable both to civil and prætorian actions, and, as might be inferred, had their origin both in the civil and prætorian law. See Keller's Civ. Proc. p. 134 et seq. Gai. ii. 84, 149, 198; iii. 168, 179; iv. 110, 117, 119. Vat. Frag. 94. Coll. Leg. 16. 3.

79. In aliis quoque speciebus naturalis ratio requiritur: proinde si ex uvis aut olivis aut spicis meis vinum aut oleum aut frumentum feceris, quæritur utrum meum sit id vinum aut oleum aut frumentum, an tuum. Item si ex auro aut argento meo vas aliquod feceris, aut ex meis tabulis navem aut armarium aut subsellium fabricaveris; item si ex lana mea vestimentum feceris, vel si ex vino et melle meo mulsum feceris, sive ex medicamentis meis emplastrum aut collyrium feceris: quæritur utrum tuum sit id quod ex meo effeceris, an meum. Quidem materiam et substantiam spectandam esse putant, id est, ut cujus materia sit, illius et res quæ facta sit videatur esse; idque maxime placuit Sabino et Cassio. Alii vero ejus rem esse putant qui fecerit; idque maxime diversæ scholæ (l) auctoribus visum est: sed eum quoque cujus materia et substantia fuerit, furti adversus eum qui subripuerit habere actionem; nec

79. Also in other individual cases, recourse is had to the principle of natural rights; thus if you have obtained wine, oil, or grain, from my grapes, or olives, or ears of corn, the question arises, is the corn, or olives, or grain, my property or yours; again if you have made a vessel out of my gold or silver, or have constructed a ship, or a chest, or a bench from my planks, or if you have made clothes out of my wool, or mead out of my wine and honey, or a plaster or salve from my drugs, the question arises is the article made out of my materials, your property or mine. Some are of opinion that the material and substance are to be regarded, that is to say, that the thing fabricated is the property of the person who owns the material of which it is composed: this was the opinion of Sabinus and Cassius. Still others think that it should be the property of the party who has made it, and this is the

minus adversus eundem conditionem ei competere, quia extinctæ res, licet vindicari non possint condici tamen furibus et quibusdam aliis possessoribus possunt. (m)

opinion generally with the writers of the opposite school. But the owner of the material and substance has the *actio furti* against him who has stolen it, and he can also prosecute the same person by the *condicio*, because things which have been destroyed, though they do not admit of vindication, can yet be claimed again by the *condictio* against robbers, and certain other possessors.

JUST. ii. 1. 25.

(l) For remarks on the *diversæ scholæ* see the introduction to this work, p. 11, and Ins. Rom. Law, s. xiv. p. 90 et seq.

(m) Gaius iv. s. 5 states the difference between the two great divisions of the *actio* into *vindicationes* and *condictiones*. "Appellantur autem *in rem* quidem actiones VINDICATIONES *in personam* vero actiones, quibus dari fieri oportere intendimus CONDICTIONES." The distinction between *vindicationes* and *condictiones* was an essential one, and was not affected by the change in the form of procedure from the *Legis Actiones* to the *Formulæ*. See Art. in Dict. Gr. and Rom. Ant. on "Actio" and "Vindicatio," and notes on this subject in the Fourth Book.

DE PUPILLIS AN ALIQUID A SE ALIENARE POSSUNT.

80. Nunc admonendi sumus neque feminam neque pupillum sine tutoris auctoritate rem Mancipi alienare posse; nec Mancipi vero feminam quidem posse, pupillum non posse. (n)

CONCERNING PUPILS, WHETHER THEY CAN ALIENATE ANYTHING.

80. We must now be reminded, that no woman or pupil can alienate a *res Mancipi* without the authority of a tutor. A woman can indeed alienate a *res nec Mancipi*. But a ward cannot.

JUST. ii. 8. 2.

(n) Although proprietor, a pupil had no power to alienate his property, neither *res Mancipi* nor *res nec Mancipi*. A woman under the *tutela* could give a title to *res nec Mancipi* but not to *res Mancipi*. When the prætor had made a

decree respecting the possession of disputed goods until the right of property were decided, it is obvious that the person under such an interdict had no power to convey. Nor could an insane person, not to say a raving maniac, convey, except in a lucid interval. The prodigal also being denied the administration of his own affairs, could have no power of alienation. “*Lege duodecim tabularum prodigo interdictur bonorum suorum administratio.*” Again, “*Curatio autem ejus, cui bonis interdicitur.*” l. 1. pr. s. 1. Dig. de cur. fur. (27. 10.) Domenget, p. 172. For the various degrees of unsound mind, see Cic. Tuscul. lib. iii. c. 5.

81. Ideoque si quando mulier mutua pecuniam alicui sine tutoris auctoritate dederit, quia facit eam accipientis, cum scilicet ea (o) pecunia res nec mancipi sit, contrahit obligationem.

81. If therefore at any time a woman parts with money as a loan, without the authority of the tutor, she contracts an obligation, because she transfers the property of the money to him who receives it, since money is a *res nec mancipi*.

(o) Huschke says that “ea” cannot be right; that it would refer to “mutua pecunia,” and would give the erroneous meaning that the “mutua pecunia” were *res nec mancipi*. He thinks that the doubtful marks were probably “et,” which he considers arose from a mistake in the doubling of the last letters of *scilicet*. Also, that money, which Gaius had not mentioned in ii. 20, is *res nec mancipi*, is but a feeble statement for him to make. In a similar manner, in the following paragraph, “quia eam pecuniam non fecit accipientis” should not have stood, as Lachmann had conjectured, for the completion of the lines, but “quia s. t. a. (sine tutoris auctoritate) pecuniam, etc.” Compare ii. 83, fin., where the words “sine t. a.” stand in a general proposition.

82. At si pupillus idem fecerit, quia eam pecuniam non facit accipi-

82. But if a pupil does the same, he contracts no obligation, because

entis, nullam contrahit obligationem. Unde pupillus vindicare quidem nummos suos potest, sicubi extent, id est intendere suos ex jure Quiritium esse: mala fide consumptos vero ab eodem repetere potest quasi possideret. Unde de pupillo quidem quaeritur, an nummos quoque quos mutuos dedit, ab eo qui accepit bona fide alienatos petere possit, quoniam is scilicet accipientis eos nummos facere videtur.

83. *At ex contrario res tam mancipi quam nec mancipi mulieribus et pupillis sine tutoris auctoritate solvi possunt, quoniam meliorem conditionem suam facere iis etiam sine tutoris auctoritate concessum est.*

84. *Itaque si debitor pecuniam pupillo solvat, facit quidem pecuniam pupilli, sed ipse non liberatur, quia nullam obligationem pupillus sine tutoris auctoritate dissolvere potest, quia nullius rei alienatio ei sine tutoris auctoritate concessa est. Set tamen si ex ea pecunia locupletior factus sit, et adhuc petat, per exceptionem doli mali summoverti potest.*

85. *Mulier vero etiam sine tutoris auctoritate recte solvi potest: nam qui solvit, liberatur obligatione, quia res nec mancipi, ut proxime diximus, a se dimittere mulier et sine tutoris auctoritate potest: quamquam hoc ita est, si accipiat pecu-*

he does not make the money the property of him who receives it, and therefore the pupil can claim by vindication his money, as long as it is in existence, that is to say, he can sue for it *ex jure Quiritium*; but if it has been expended *mala fide*, he can reclaim it just as if it still remained in possession. On this account, with respect to a ward, it is a question whether the money which he gives as a loan can be reclaimed from the person who has received it in good faith after it has been disposed of; since he certainly appears to have legally transferred the money to the receiver.

83. But, on the other hand, women and pupils can receive in payment without the authority of their tutor, both *res mancipi* and *res nec mancipi*, because it is permitted to them to improve their condition, without the authority of a tutor.

84. Therefore, if a debtor pay a sum to a pupil, the money becomes the property of the pupil, but he himself is not freed from his obligation, because a pupil cannot dissolve an obligation without the authority of his tutor, since no power of alienation, without his tutor's authority, has been granted him. But still, if he be made richer by means of this sum, and he afterwards claim it, he will be repelled by the *exceptio doli mali*.

85. But, on the other hand, a payment may be legally made to a woman without the authority of her tutor for he who pays is freed from his obligation, since the woman, as we have just said, can alienate *res nec mancipi*, without the authority of

niam: at si non accipiat, *sed* habere se dicat, et per acceptilationem velit debitorem sine tutoris auctoritate liberare, non potest. (p)

her tutor; although this is to be understood when she actually receives the money. If however she have not received it, but says, she takes it as payment, and wishes to free the debtor without the authority of the tutor, by a simple acquittance, (*acceptilatio*) she cannot do this.

JUST. II. 8. 2.

(p) *Acceptilatio* was a means of dissolving an obligation by mutual interrogation, the creditor acknowledging that he had received that which in fact he had not received. “*Acceptilatio est liberatio per mutuam interrogationem, qua utriusque contingit ab eodem nexu liberatio.*” 1. 1. Dig. de accep. (46. 4). The definition just quoted is from Modestinus, whose language is regarded as most exact and clear. Gaius, in iii. 169, both defines and explains *Acceptilatio*, he says, “*Acceptilatio est imaginaria solutio; quod enim ex verborum obligatione Titio debetur, id si velit Titius remittere, poterit sic fieri, ut patiatur haec verba debitorem dicere quod ego tibi promisi, habesne acceptum? et Titius respondeat: habeo.*”

The fuller consideration of *acceptilatio* must be reserved till we treat of the Roman law of Obligations, when it will be viewed in connection with other modes of solutio.

86. *Adquiritur autem nobis non solum per nosmet ipsos, sed etiam per eos quos in potestate manu mancipiove habemus: item per eos servos in quibus usumfructum habemus; item per homines liberos et servos alienos quos bona fide possidemus. De quibus singulis diligenter dispiciamus.*

86. We gain possession of property, not only by ourselves, but also by those whom we have under our power (*potestas*), in *manum*, or in *mancipium*, also by those slaves, of whom we have the usufruct; and by those freemen and slaves belonging to others whom we possess in good faith. Let us examine carefully these different matters.

JUST. II. 9. pr.

87. Igitur *quod* liberi nostri quos in potestate habemus, item quod servi *nostri* mancipio accipiunt, vel ex traditione nanciscuntur, sive quid stipulentur, vel ex aliquolibet causa adquirunt, id nobis acquiritur: ipse enim qui in potestate nostra est nihil suum habere potest, et ideo si heres institutus sit, nisi nostro jussu, hereditatem adire non potest, et si jubentibus nobis adierit, hereditatem nobis acquirit proinde atque si nos ipsi heredes instituti essemus. Et convenienter scilicet legatum per eos nobis acquiritur. (*q*)

87. Thus, that which is held by our children whom we have in our *potestas*, also what our slaves receive by mancipation or by tradition, and that which they gain by stipulation, or acquire in any other way, is acquired for us; for he who is under our *potestas* can have nothing as his own; and therefore, if he be instituted heir, he cannot enter upon the *hereditas* except by our order, and if he has entered by our permission, he acquires the estate for us, just as if we ourselves had been instituted heirs. And thus by their means a legacy is in like manner acquired for our use.

JUST. II. 9. 3

(*q*) The property acquired by a slave was for the benefit of his owner, with the exception of the inheritance, which went to the master only when a slave had taken possession of it by his order. If a slave were instituted heir he was obliged, when commanded by his owner, to enter upon an inheritance, Jus. ii. sec. 3. Although the text says that all that which was acquired by a slave or a son *ex qualibet causa*, belonged to the dominus, or to the pater familias, it must be remembered that the way in which persons under the *potestas* could acquire was limited, as they had not the *jus vindicandi*, and hence could not acquire *in jure cessio*. See ii. sec. 90. and Domenget in loco.

88. Dum tamen sciamus, si alterius in bonis sit servus, alterius ex jure Quiritium, ex omnibus causis ei soli per eum adquiri cujus in bonis est.

88. Moreover, we know that if one person holds a slave *in bonis*, whilst another owns him *ex jure Quiritium*, in accordance with every legal principle only the owner *in bonis* will acquire through the slave.

89. Nom solum autem proprietas per eos quos in potestate habemus acquiritur nobis sed etiam possessio: cujus enim rei possessionem adepti

89. But, not only is the ownership acquired for us by those whom we have under our power, but also the possession. For of whatever things

fuerint, id nos possidere videmur. Unde etiam per eos usucapio procedit. (r)

they have obtained possession we seem to be the possessors. Hence also usucapio takes effect through them.

JUST. II. 9. 3.

(r) For the distinction between ownership (*proprietas*) and possession (*possessio*) see the notes on secs. ii. 40 and 49.

90. Per eas vero personas quas in manu mancipiove habemus, proprietatem quidem adquiritur nobis ex omnibus causis, sicut per eos qui in potestate nostra sunt: an autem possessio adquiratur, quaeri solet, quia ipsas non possidemus.

90. And in truth through those persons who are in our *manus*, or in *mancipium* to us, we acquire ownership under all circumstances, just as through those who are under our *potestas*, but whether we acquire also the possession, is commonly doubted, because we do not possess the persons themselves.

91. De his autem servis in quibus tantum usumfructum habemus ita placuit, ut quidquid ex re nostra vel ex operis suis (s) adquirunt, id nobis adquiratur; quod vero extra eas causas, id ad dominum proprietatis pertineat. Itaque si iste servus heres institutus sit legatumve quod ei datum fuerit, non mihi sed domino proprietatis adquiratur.

91. Concerning those slaves in whom we have only the usufruct, it has been decided that whatever they acquire from anything belonging to us, or by their own labours is acquired for us; but what they acquire from sources beyond these belongs to their legal owner. Therefore, if a slave belonging to you is appointed heir, or if a legacy is given to him, it is acquired not by me, but by the owner of the slave.

JUST. II. 9. 4.

(s) *Vel ex operis suis*. The term *operæ* is applied specially to the labour and service of slaves, animals and persons manumitted. See Dig. (7. 7.) l. 1. Dig. de oper. lib. (38. 1.) where Paulus says, "*Operæ sunt diurnum officium.*" Cod. (3. 3.) Cod. (6. 3.) The *operæ* of slaves, freed-persons and animals arose from the right of the possessor to enjoy every use and advantage from the service which, according to their particular nature, they were considered capable of yielding. This right terminated when the slave animal died, or came under the dominium of another owner by usucapio. Mackeldey, pp. 334, 335.

92. Idem placet de eo qui a nobis bona fide possidetur, sive liber sit sive alienus servus. Quod enim placuit de usufructuario, idem probatur etiam de bona fide possessore. Itaque quod extra duas istas causas adquiritur, id vel ad ipsum pertinet, si liber est, vel ad dominum, si servus sit.

92. The same rule holds with any one whom we possess in good faith, whether he be a freeman or the slave of another person. For the rule which has been established with respect to the usufructuary also obtains in the case of the possessor in good faith. Therefore, whatever is acquired from other sources than those two, belongs either to the man himself, if he be a freeman, or to his owner if he be a slave.

JUST. II. 9. 4.

93. Sed si bonæ fidei possessor usuceperit servum, quia eo modo dominus fit, ex omni causa per eum sibi adquirere potest: usufructuarius vero usucapere non potest, primum quia non possidet, sed habet jus utendi et fruendi; deinde quia scit alienum servum esse.

93. But if a possessor in good faith has gained his right to a slave by *usucapio*, since he becomes the owner by this means, he can acquire for himself through the slave from every source. But the usufructuary cannot acquire by *usucapio*, first because he does not really possess, but has only the *jus utendi et fruendi*; and secondly because he knows the slave to belong to another.

JUST. II. 9. 4.

94. De illo quæritur, an per eum servum in quo usumfructum habemus possidere aliquam rem et usucapere possumus; quia ipsum non possidemus. Per eum vero quem bona fide possidemus sine dubio et possidere et usucapere possumus. Loquimur autem in utriusque persona secundum distinctionem quam proxime exposuimus, id est si quid ex re nostra vel ex operis suis adquirant, id nobis adquiritur.

94. In regard to this point it is a question whether we can possess any thing by *usucapio* through that slave in whom we have the usufruct, since we do not possess the slave himself. But by means of the slave whom we possess in good faith, we can without doubt become possessors and hold by *usucapio*. But we assert this with regard to persons of both classes (slaves and freemen) in accordance with the distinction laid down previously, i.e., if they acquire anything by means of something belonging to us, or by their own exertions, it is acquired for us.

JUST. II. 9. 4.

95. Ex his apparet per liberos homines quos neque juri nostro sub-

95. Hence it appears that we can in no manner acquire property

jectos habemus neque bona possidemus, item per alienos servos, in quibus neque usumfructum habemus neque justam possessionem, nulla ex causa nobis adquiri posse. *Et hoc est quod dicitur per extraneam personam nihil adquiri posse, excepta possessione; de ea enim quæritur, an per liberam personam nobis adquiratur.*

through free persons whom we neither have in our power, nor possess *bona fide*; nor further through the slave of another, in whom we have neither the usufruct, nor legal possession. And this is what is meant when it is said that nothing can be acquired by means of a stranger, except the possession, and even with reference to this it is a question whether it may be acquired for us by means of a free person.

JUST. II. 9. 5.

96. In summa sciendum est *iis qui in potestate manu mancipiove sunt nihil in juri cedi posse. Cum enim istarum personarum nihil suum esse possit, conveniens est scilicet, ut nihil suum esse per se in jure vindicare possint.* (t)

96. In general, one ought to know that to those who are under the *potestas*, in *manus* or in *mancipium*, nothing can be ceded *in jure*. For since such persons can have no property of their own, it clearly follows that they cannot vindicate anything as their own *in jure*.

(t) Huschke first proposed “*ut nihil suum esse per se in jure vindicare possint*,” and he would call attention to *Celsus*, l. 25. *Dig. de novat.* (46. 2.) . . . “*nam et his, qui in nostra potestate sunt, quod ab his creditum est, recte interdum solvitur: cum nemo eorum per se novare priorem obligationem jure possit.*”

97. *Hactenus tantisper admonuisse sufficit quemadmodum singulæ res nobis adquirantur. Nam legatorum yas, quo et ipso singulas res adquirimus, opportunius alio loco referemus. Videamus itaque nunc quibus modis per universitatem res nobis adquirantur.* (u)

97. For the present it is sufficient to have noticed how we may acquire particular things (*res singulæ*). We shall refer more conveniently in another place to the law of legacies, by which also we acquire individual things. Let us now see how things are acquired by us *per universitatem*.

JUST. II. 9. 6.

(u) Hitherto *Gaius* has been treating only of singular succession; he now passes to that part of the *Institutes* in which he explains the doctrine of what is denominated “*Universal Succession*.” He mentions first *Inheritance*, and under that head treats of *Wills*, and matters connected

therewith. In section 77 of the Third Book he treats of "Bonorum emptiones;" in section 82, "De adquisizione per adrogationem;" and in section 85, of "Hereditatis in jure cessio." To make this subject of universal succession more intelligible, the attention of the student is invited to the following explanations.

The most important case of universal succession which occurs in Roman law is that of the succession to the inheritance of a deceased person, which rested on this simple though fundamental principle; namely—That legal personality might be transferred to and made to rest upon another individual. The realization of this idea should not be found difficult to the English student who has reflected on the maxim, "The king never dies." The physical man or woman who sways the sceptre for the time being passes away to the silent mausoleum of the dead, for death is impartial; but the king, in his official capacity as Rex, never dies, since the instant after the physical man has expired his successor inherits his honours, and must bear all his weighty responsibilities. Hence, jurists properly speak of the *demise* of the Crown. It was precisely so in the Roman law: although the physical man died, the legal person survived, and until this legal personality attached to the heir, it was held to reside in the *hereditas jacens*. A universal succession could never be created by the arbitrary will of a person, or by a mere legal conveyance or transaction. If a man had given to another all that he possessed and all that he ever might or could possess, this did not create an universal succession, for he could not by any act of will nor by any legal method convey to another his *persona*. Universal succession always implied that the legal personality must be dissolved before its rights and obligations could repose upon what the Germans call another "Traeger," and what we, for want of a better word, must denominate another subject or individual. The following cases are to be distinguished: 1. The most important case, as the above remarks will suggest, arose from the death of the physical man. When

this event took place, the Roman law held that it was only the human being that died, and that the legal *persona* still continued to survive. It was, so to speak, as if the legal spirit of the *defunctus* were unsettled and bereft of repose until it found another subject in whom it might reside.

2. The second principal case was that of the "capitis deminutio" of an existing legal person. Every "capitis deminutio" implied the separation of the legal personality from the individual in whom it had resided. Such was the case with all three of the "capitis deminutiones," not only with the maxima and media, but also with the minima. When a man, for instance, who was a "homo sui juris," became a "homo alieni juris," his legal personality was terminated. In the cases also of "adrogation" and "coemptio in manum," there were "capitis deminutiones," and accompanying these an universal succession. See pp. 95, 96, 102, 103. When Justinian abolished the distinction between "homines sui juris" and "homines alieni juris," universal succession in the case of the "capitis deminutio minima" of course ceased. It still however continued when the "capitis deminutio" was maxima or media.

3. A very peculiar mode of universal succession had its origin in praetorian law; namely, that of the "bonorum emptio." This method was introduced in the time of the Republic, and a praetor named Publius Rutilius was, as we learn from Gaius, its author. Gaius says, in speaking of the actio Rutiliana, "Quia praetore Publio Rutilio, qui et bonorum venditionem introduxisse dicitur, etc." lib. iv. s. 35. This member of the Rutilian family was not the Rutilius who was consul A. U. C. 664, but the well-known statesman and jurist who was military tribune under Scipio in the Numantine war, praetor B. C. 111, consul B. C. 105, who in B. C. 95 was legatus under Q. M. Scaevola, and subsequently proconsul of Asia. Pomponius refers to him in the article in the Digest which contains an epitome of the history of Roman law, where he says "Publius Rutilius Rufus, qui Romae consul et Asiae proconsul fuit." l. 40. Dig. de orig. jur. l. 2. Cic. pro Planc. 21. Festus

v. Rutili. Rutilius appears to have been a stern, just and upright man, and, like other distinguished prætors, he made a permanent change, or rather a notable reform, in the laws of his country. In the ancient Roman law, according to the Twelve Tables, when the debtor was unable to pay, the most harsh and severe measures were sanctioned against him. See note on "Nexum," p. 229. The creditor had power to seize the person of his debtor, and to treat him in a most cruel and revolting manner, ultimately reducing him to slavery, or putting him, if he were so minded, to a painful death. As civilization advanced such barbarous customs became utterly intolerable, and the prætor Rutilius introduced a mode of procedure known as the "*bonorum emptio*." This was a kind of execution or sale, involving an universal succession, applicable to the property and estates of the living as well as to those of the dead. In the case of the living, when there was fraud, if, for instance, a debtor got rid of his property "*in fraudem creditorum*," either by concealment or otherwise, or, according to Cicero pro Quinct. c. 19. "*Qui fraudationis causa latitarit,—cui heres non exstabit,—qui exilii causa solum verterit*;" or if he were absent to avoid his debts; or if when legal proceedings were taken he was undefended (*qui absens iudicio defensus non fuerit*); or when, in accordance with the *lex Julia "de bonis cedendis"*, (passed in the time of Julius Cæsar or of Augustus,) he gave up his property for sale and distribution that he might escape all personal molestation from his creditors. See Gai. iii. 78. Cod. l. 4. *qui bon. ced. pos.* (7. 71.) When any of these circumstances entitling to the "*bonorum emptio*" arose, the prætor could authorise a "*missio in bona*," and the estate was held for thirty days if the owner was living, and for fifteen days if he were dead, after which period a "*magister bonorum*" was appointed, and the property was sold to that creditor who offered to pay the largest per centage on the debts due from the estate. See Gai. iii. 79. and the passages cited by Goeschen. Puchta's *Instit.* iii. p. 238 et seq. Marezoll's *Instit.* s. 100.

p. 234. et seq. In the above instances there was an universal succession to the entire estate of the individual, so that the legal personality was transferred from one to another. Thus "a universal succession is a succession to a *universitas juris*. It occurs when one man is invested with the legal clothing of another, becoming at the same moment subject to all his liabilities, and entitled to all his rights." Maine's *Anc. Law*, p. 179. The above definition may be taken as correct, bearing in mind that it expresses the exact truth for the classical period of the law. Constantine at a later time constituted the *beneficium inventarii*, thus relieving the universal successor from the evils of a *damnosa hereditas*. This subject, however, will require to be again referred to in its proper place.

98. Si cui heredes facti sumus, sive cujus bonorum possessionem petierimus, sive cujus bona emerimus sive quem adrogaverimus, sive quam in manum ut uxorem receperimus, ejus res ad nos transeunt.

98. If we have been made heirs to any one, or seek the possession of any person's goods, or have bought the property of any one, or have arrogated any one, or have received any one in manus, as for example a wife, the property of that person passes over to us.

JUST. II. 9. 4.

99. Ac prius de hereditatibus dispiciamus, quarum duplex condicio est: nam vel ex testamento, vel ab intestato ad nos pertinent.

99. And first let us consider rights of succession, of which the nature is two-fold; for they belong to us by testament, or by intestacy.

100. Et prius est, ut de his dispiciamus quæ nobis ex testamento obveniunt. (v)

100. Firstly, let us enquire about those things which fall to us by testament.

JUST. II. 9. 6.

(v) In the present section Gaius directs our attention to the important subject of the Roman "testament." It will be useful to present a brief historic sketch, tracing the various sources from which the "Will," as we now express it, was derived. In ancient Rome, and until the epoch of the Twelve Tables, there does not appear to have been any law of inheritance, in the strict acceptation of the term. When a man died and left a *suns heres*, his entire property

belonged to this person. If he died leaving several children his property survived to them, and they were called his *sui heredes*. Father and children, in the early period of Rome, and for the first three centuries of the State, appear to have constituted but one legal *persona*; so that when the pater-familias died, the *sui heredes* did not *acquire* the property, but it *continued* with them, without any change or limitation of ownership. In this continuance there was no actual testamentary succession. If there were no children the property of the *defunctus* became simply a “*res nullius*,” and whoever could was at liberty to take it and hold it. It belonged as it were to the “strong man armed,” who might make it his own and “hold his goods in peace.” If there were no *sui heres*, upon the death of the owner all his assets and all his debts were for ever extinguished. In point of fact, the property seems to have come into the possession of the *propinqui* or relations of the deceased, who held it by *occupatio* without possessing any legal right of inheritance. Before the period of the Twelve Tables there was what has been termed a “*testamentum in calatis comitiis*.” This was no real testament, but the enactment of a law by the people; a *lex curiata*, in which an heir was named in the form of an arrogatio. The “*testamentum per æs et libram*,” in its *older* form, was nothing more than a solemn enactment on the part of the legislative authorities of the State, empowering the person named to enter upon the property of the *defunctus* and to enjoy it as his own. With our modern ideas about Wills, it seems to us natural that a person possessed of property should be able to bequeath it. But such was by no means the idea of antiquity. The Greeks, before the famous legislation of Solon, possessed no testamentary power, as we understand it, and the laws of the Greek legislator did not give such to whoever might choose to exercise it.

In ancient Germany, so far as its laws and customs are known, there does not appear a single trace of any testamentary power until the introduction from Italy of the Ro-

man system of jurisprudence. Again, long after the establishment of a law of inheritance, there remained in the *jus civile*, unmistakeable traces that testamentary power had not always existed among the Romans, and that the above view of this subject is correct. To take an instance, there could be no *furtum* or theft of "*res hereditariæ jacentes*," and after one year the person who took such things became the lawful owner.

The promulgation of the laws of the Twelve Tables was an important epoch in the history of Roman jurisprudence, for it introduced for the first time testamentary succession by the enactment of the celebrated law contained in the following words: "*Uti legassit super familia pecuniaque suæ rei ita jus esto.*" Cic. de Invent. ii. 50. sec. 148, or, as Justinian expresses the same idea in Novella xxii. c. 2, "*Uti legassit quisque de sua re, ita jus esto.*" In the new form for making a Will which now arose, the Roman citizens who were required to be present at the solemnities, were without doubt there to represent the entire Roman people. There was no need any longer for an assembly of the curies for the purpose of passing a "*lex curiata*," to convey an estate, but effect was given to the "*ultima voluntas*" of the testator, and the solemn form adopted, with the "*quinque cives Romani*," lent something of the dignity of public legislation to a proceeding which had now become one of a private and personal character. Hence, the old Roman jurists themselves, when they refer in their writings to wills, tutors and heirs, always point back to the laws of the Twelve Tables, and affirm that an heir, or a legacy, or a tutor was appointed by virtue of the laws above cited. There is, however, another point of equal importance to be mentioned; namely, that *legal succession* to the estate of a defunctus had its origin in the laws to which we have just referred. When there was no "*suus heres*," the "*agnati*" and the "*gentiles*" succeeded to the property of the deceased person, which was no longer accounted a "*res nullius*" and could not, as in earlier times, be possessed by the first occupant. The law which originated this universal succession

was the following: *Si intestato moritur cui suus heres nec escit, adgnatus proximus familiam habeto.*" The *sui heredes* were not called to the inheritance by this law of the Twelve Tables, but the law recognises them, and says that when there were none, the "*proximus adgnatus*" should always succeed to the patrimony. The decemviri took it for granted that if a *sui heres* existed, he would continue to be the possessor, and not *succeed*, hence the law provided only for the absence of any *sui heres*. This is the earliest idea of testamentary succession found in the laws of Rome.

The principles contained in these laws were operative from the period when they were enacted until the time of Justinian—during the flight of nearly a thousand years—and they lie at the very basis of the law of inheritance. It was not till the end of Republican Rome that there came into existence a new source of inheritance, having its origin in prætorian law. This change, however, did not annul the strict law of the *jus civile* which rested upon the enactments of the decemvirs; nor was the ancient law by any means superseded, but there sprung up by the side of it a new species of inheritance based upon, and derived from the principles of the *jus gentium*. The main distinctions were that whereas the old law had admitted only the *agnates* to the succession, under the prætorian system the *cognates* were also admitted, whilst a much freer testamentary form sufficed. Not that the cognates were placed on a level with the agnates, but the former who had been hitherto excluded by the *jus civile*, were now admitted, although in a subordinate rank, to the succession. In the place of the testamentum "*per æs et libram*," there now arose what has been denominated the "*testamentum per septem testes signatum*." The old forms of mancipation and nuncupation, or mentioning the heir by word of mouth, were superseded, and the will was simply made in writing. *Gai. ii. secs. 119, 147. l. 1. sec. 10. 11. Dig. de bon. pos. s. t. (37. 11). Cic. in Verr. l. 15.* In the later times of the emperors an effort was made to fashion the law of inheritance upon the plan of the boni-

tarian ownership. l. 15. Cod de testam. (6. 23). Nov Theod. 23. Again an epoch was marked in the law of inheritance at Rome by the enactment of the *senatus consulta Tertullianum* and *Orphitianum*. By the former *senatus-consultum*, passed in the reign of Hadrian, among other provisions, a right of inheritance was given to the mother after the *descendentes*. Ins. iii. 3. de S. C. Tertul. l. 1. 2. 4. Dig. ad Sen. Tertul. (38. 17) By the *senatus-consultum Orphitianum* the children became entitled to succeed to their mother. This *senatus-consultum*, passed in A. D. 178, in the reign of M. Aurelius, not only enabled children to take the property of their mother, which up to that time they had not been able to do, except as *cognati*, but it also gave them preference over the *consanguinei*. Previous to these *senatus-consulta* every agnate excluded the mother and her children. Henceforth a pathway was broken for the admission of the principles of what was denominated the “*bonorum possessio*,” a term to be hereafter more fully explained. So that in the time of Justinian, and before the passing of the 118th Novella, which modified the entire law upon this subject, the cognates were undoubtedly called to the inheritance. The Emperor Justinian placed, so to speak, the topstone to the work, which resulted from the tendencies of a thousand years, when, by the passing of the Novella just cited, he declared that the cognates should have as good a right to the succession as the agnates. Thus, in ancient Rome for five hundred years property and succession were regulated entirely by the *jus civile*; afterwards, for a second period of five hundred years, there existed two distinct institutions running parallel to each other, by means of which the rights of property and of succession were regulated, the older one based upon the ancient law of the State, the more recent one the fruit of the wisdom of the prætors, and derived from the *jus gentium*. Justinian fused the two institutions into one in a way to be hereafter more fully explained, and thus rules of law were originated which continued till the decline and close of the Roman empire.

101. Testamentorum autem genera initio duo fuerunt. Nam aut calatis comitiis faciebant, quæ comitia bis in anno testamentis faciendis destinata erant, aut in procinctu (*w*) id est cum belli causa ad pugnam ibant: procinctus est enim expeditus et armatus exercitus. (*x*) Alterum itaque in pace et in otio faciebant, alterum in prælium exituri.

101. But originally there were two kinds of testaments, for they were made either before the *calata comitia*, which were held twice yearly for the purpose of making testaments, or they were made *in procinctu*, that is, when on account of a war, men were just going into battle: for an equipped and armed host is called *procinctus*. Consequently one kind of testament was made in a time of peace and tranquillity, the other on the eve of battle.

(*w*) *Testamentum in procinctu facere*. That is, to make a testament just as one is going into battle.

(*x*) *Expeditus* is rendered equipped, not in the sense of being burdened, but as being freed from the encumbrances of the march and ready for conflict.

102. Accessit deinde tertium genus testamenti, quod per æs et libram agitur. Qui neque calatis comitiis (*y*) neque in procinctu testamentum fecerat, is si subita morte urgebatur, amico familiam suam [id est patrimonium suum] mancipio dabat, eumque rogabat quid cuique post mortem suam dari vellet. Quod testamentum dicitur per æs et libram, scilicet quia per mancipationem peragitur.

102. Subsequently a third kind of testament was established, which was made *per æs et libram*. For if he who had neither made a testament before the *calata comitia* nor *in procinctu*, being suddenly overtaken by death, had transferred his familia, i.e. his patrimony, by mancipium to a friend, and told him what he wished to be given after his death to each of the parties interested in his property; this testament is called *per æs et libram*, because it is effected by means of the mancipation.

(*y*) *Calatis comitiis*. The word *calatus* means "called together," and is a part of the old verb *calo* to call. The *comitia calata* was the term applied to the assembly of the curies, and the testamentum calatis comitiis was the declaration of the last will made by a person in the presence of the assembled curies. Inst. ii. 1. 1.; Ulp. tit. xx. 2. There was in this case no real testamentary succession, but the

parties entitled to the property, entered upon the inheritance by virtue of the *lex curiata*.

103. Sed illa quidem duo genera testamentorum in desuetudinem abierunt; hoc vero solum quod per *æs et libram* fit in usu retentum est. Sane nunc aliter ordinatur atque olim solebat. Namque olim *familiæ* emptor, id est qui a testatore *familiam* accipiebat mancipio, heredis locum optinebat, et ob id ei mandabat testator, quid cuique post mortem suam dari vellet. Nunc vero alius heres testamento instituitur, a quo etiam legata relinquuntur, alius *dicis* gratia propter veteris juris imitationem *familiæ* emptor adhibetur. (z)

103. But the first two kinds of testament have fallen into disuse, and the kind which is now retained in use is that made *per æs et libram*. A testament is now made in a way different from that in which it was formerly made. For formerly the *familiæ* emptor, that is to say, he who received the *familia* by means of mancipation from the testator, obtained the place of heir, and in this character the testator charged him, as to what he wished should be given to each of the parties interested in his property after his decease. But at the present time one person is instituted heir to the inheritance, who is burdened with the legacies, while for the sake of form, and in order to imitate the old law, another is added as a *familiæ* emptor.

(z) *Familiæ* emptor. Both the term *familia* and the word *emptor* need some explanation. The former was applied to both persons and things. "*Familiæ* appellatio, varie accepta est; nam et in *res* et in *personas* diducitur; in *res* utputa in lege XII tab. his verbis; agnatus proximus *familiam* habeto: l. 195. s. 1. Dig. de verb. sig. (50. 16.) l. 14. s. 8. Dig. ad senat. Trebel. (31. 1.) We meet with such phrases as "*familiam* vendere, mancipare, mancipio dare, accipere; *familiæ* venditio, mancipatio, actio *familiæ* eriscundæ: *familiam* restituere." Gai. ii. 102—106, 109, 115. Ulp. tit. xx. The term *familia* was also applied especially, though not exclusively to those persons who were united by the agnatic band. "*Jure proprio familiam* dicimus plures personas quæ sunt sub unius potestate, aut natura, aut jure subjectæ." l. 195. s. 2, Dig. tit. cit. (50. 16.) See also secs. 4 and 5, and l. 40. s. 2. Cod. The term *familia* again was applied to natural and adopted children as well as to the entire

body of a man's slaves. "Familix appellatione omnes, qui in servitio sunt, continentur." 1. 25. s. 2. Dig. de ædil. Edic. (21. 1.)

The term *emptor* denotes one that is apparently the purchaser of the inheritance. When a man executed his will he made a fictitious sale of his property to a person, and this person, after the death of the testator, gave to each heir the portion left to him in the will. The *familix emptor* thus received the "familia per mancipationem." The law had changed in the time of Gaius. A person was instituted *heres* (*heres testamento instituitur*), who was charged with the payment of legacies, "a quo etiam legata relinquebatur," and another to represent the *familix emtor* of the older law. See Dict. Gr. and Rom. Antiq. Art. "Testamentum." Hermann's Handlexicon, Art. "Familia et Emere."

104. *Eaque res ita agitur. Qui facit testamentum (a) adhibitis, sicut in ceteris mancipationibus, v testibus civibus Romanis puberibus et libripende, postquam tabulas testamenti scripserit, mancipat alicui dicis gratia familiam suam; in qua re his verbis familix emptor utitur FAMILIAM PECUNIAMQUE TUAM ENDO (b) MANDATA TUTELA CUSTODELAQUE MEA ESSE AIO EAQUE, QUO TU JURE TESTAMENTUM FACERE POSSIS SECUNDUM LEGEM PUBLICAM, HOC ÆRE, et ut quidam adiciunt ÆNEAQUE LIBRA, ESTO MIHI EMPTA. Deinde ære percutit libram, idque æs dat testatori velut pretii loco. Deinde testator tabulas testamenti tenens ita dicit: HÆC ITA UT IN HIS TABULIS CERISQUE SCRIPTA SUNT ITA DO, ITA LEGO, ITA TESTOR, ITAQUE VOS QUIRITES TESTIMONIUM MIHI PERHIBETOTE. Et hoc dicitur nuncupatio. Nuncupare est enim palam nominare; et sane quæ*

104. The thing is done thus. The testator, as in other mancinations, in the presence of five witnesses, Roman citizens of full age, and a libripens, after he has written his testament, mancipates his patrimony to a person for form's sake. In the performance of this the *familix emptor* uses these words: "in buying your *familia* and *pecunia*, I receive under my tutela and protection, the things you entrust to me, and they shall be mine by the right you possess of being able to make a testament, in accordance with the *public* law by means of this copper," and as some persons add, "and by means of this balance of copper, let them be bought by me." After these words he strikes the balance with that copper, and hands over the coin to the testator, as the price of the sale, and then the testator holding the tables of the

testator specialiter in tabulis testamenti scripserit, ea videtur generali sermone nominare atque confirmare.

testament speaks as follows—"These things just as they are written on these waxen tablets I thus give, I thus bequeath, I thus testify, and thus shall you O Quirites give witness to my act." And this is called nuncupation, for "nuncupare" means to state openly; and by these general words the testator appears to designate and confirm that which he has written specially on the testamentary tablets

(a) If we repeat the letter *t* after the word *facit*, we may then read "*facit testamentum*." Just before, in sec. 103, the copyist has denoted this word merely by the letter *t*. Concerning the formula of the *familiæ emtio*, see Huschke on this section in his *Kritik*, and p. 223 "*Recht d. Nexum*."

(b) *Endo*, for "in," as "*endo cœlo*," Cic. Leg. xi. 8.; "*endo filio*," Cell. v. 19.; "*endo eo ib*," xx. 1.; "*endo procinctu*," Fest.; "*endoitium*," for "*initium*," Fest. Also *endoperator* for *imperator*. Enn. ap Cic.

105. In testibus autem non debet is esse qui in potestate est aut *familiæ emptoris* aut ipsius testatoris, quia propter veteris juris imitationem totum hoc negotium, quod agitur testamenti ordinandi gratia creditur inter *familiæ emptorem* agi et testatorem: quippe olim, ut proxime diximus, is qui familiam testatoris *mancipio* accipiebat, heredis loco erat. Itaque reprobatum est in eare domesticum testimonium.

105. But a person must not be among the witnesses, who is under the *potestas* either of the *familiæ emptor*, or of the testator, because in imitation of the old law, the whole of this business which is transacted with a view to the making of a testament, is considered as taking place between the *familiæ emptor* and the testator. And indeed formerly, as we have already said, he who received by *mancipatio* the patrimony of the testator, stood in the place of the heir. For that reason the testimony of persons belonging to the family was not allowed in this transaction.

JUST. II. 9. 10.

106. Unde et si is qui in potestate patris est *familiæ emptor* adhibitus sit, pater ejus testis esse non potest;

106. If then any one who is under *potestas* of his father, is presented as *familiæ emptor*, he cannot have his

at ne is quidem qui, in eadem potestate est, velut frater ejus. Sed si filiusfamilias ex castrensi peculio (c) post missionem faciat testamentum, nec pater ejus recte testis adhibetur, nec is qui in potestate patris sit.

father as a witness, nor can he have one who is under the same *potestas*, e. g. his brother. If a filius-familias makes a will, after he is discharged from service, and disposes of his *peculium castrense*, he cannot have his father for a witness, nor any one else who is under the *potestas* of his father.

(c) The term “peculium” is one not altogether unfamiliar to the reader of the classics. Its derivation may be at once traced to “pecunia,” which in its turn no doubt came from *pecus*, since the riches of the ancients, in a country like Italy, where land for the most part belonged to the State, consisted mainly in herds of cattle. The term “peculium,” was applied, not, as it is sometimes said, to the private property of filii-familias or slaves—for they could have no property; but to whatever was allotted to them by the pater-familias for their own personal use, for which they were held liable to account at any moment. It was not, as Dr. Maine observes, “a qualified and dependent ownership,” p. 142. Anc. Law, for there was no actual ownership, but merely the use until the moment in which the pater-familias said—“Give an account of thy stewardship, for thou mayest be no longer steward.” The fundamental idea of “peculium” is that of money or property separated and intended to be used for a certain purpose, or by a particular person. Especially was the term applied to designate the property set apart and entrusted to the filius or slave by the pater-familias, or dominus, as the case might be, for his own management and disposition. The following passages will give an exact idea of “peculium.” The word is thus defined by Tubero: “Quod servus domini permissu separatim a rationibus dominicis habet, deducto inde, si quid domino debetur.” 1. 5. sec. 4. Dig. de pec. (15. 1.)

Again, Florentinus says, “Peculium et ex eo consistit, quod parsimonia sua quis paravit, vel officio meruit a quo-

libit sibi donari, idque velut proprium patrimonium servum suum habere quis voluerit." l. 39. eod. (15. 1.)

Again, Javolenus says, "Peculium quod servus civiliter quidem possidere non potest, sed naturaliter tenet, dominus creditur possidere," l. 24. pr. de acq. vel amit. pos. (41. 2.) Slaves are not unfrequently mentioned in connection with "peculium," since the master was not indisposed to entrust to a faithful servant the usury or increase of his goods: but the *filius-familias* had also a "peculium."

Thus, Gaius says, "Filius servusve cui administratio peculii permissa est." l. 34. Dig. pr. de novat. et deleg. (46. 2.)

Finally, Ulpianus says, "Filius-familias donare non potest, neque si liberam peculii administrationem habeat; non enim ad hoc ei conceditur libera peculii administratio, ut perdat." l. 7. pr. Dig. de donation. (39. 5.) The expression "peculium castrense" was applied to the property obtained by a *filius-familias* who was a Roman soldier, as the result of his military service, or as that which had accrued to him by virtue thereof. This was, however, an advantage which did not exist in the early Roman law, but arose about the time of Augustus. It is not difficult to see that the wars which preceded the establishment of the empire, rendered it necessary to hold out special inducements to those engaged in the military service. With respect to the "peculium castrense" the *filius-familias* was considered as "sui juris." Juv. Sat. xvi. 51. It soon became of importance to determine what those things were that should be accounted or reckoned in the category of "peculium castrense," and hence we find the Emperor Alexander says, "Peculio autem castrensi cedunt res mobiles, quæ eunti in militiam a patre vel a matre aliis vel propinquis vel amicis donatæ sunt, item quæ in castris per occasionem militiæ quærentur. In quibus sunt etiam hereditates eorum, qui non alias noti esse potuerunt, nisi per militiæ occasionem etiamsi res immobiles in his erunt." l. 1. Cod. de cas. pec. mil. et præf. (12. 36.) "Peculium quasi castrensi" included also, all which the *filius-familias* realized

by virtue of his public office in the state, whether as an advocate, or a member of the clergy, or as a gift from the emperor or the empress. 1. 37. Cod. de inoffic. test. (3. 28.) 1. unic. Cod. de cast. omn. p. pec. (12. 31.) If the son died without disposing of his "peculium" it fell to the father. 1. 2. Dig. de cast. pec. (49. 17.) Puchta's Instit. vol. iii. p. 149. et seq.

107. De libripende eadem quæ et de testibus dicta esse intellegemus; nam et is testium numero est.

107. That which we have said in regard to witnesses, is also to be understood as applicable to the *libripens*: for he also is included among the witnesses.

108. Is vero qui in potestate heredis aut legatarii est, cujusve heres ipse aut legatarius in potestate est, (d) quique in ejusdem potestate est, adeo testis et libripens adhiberi potest, ut ipse quoque heres aut legatarius jure adhibeantur. Sed tamen quod ad heredem pertinet quique in ejus potestate est, cujusve is in potestate erit, minime hoc jure uti debemus.

108. But he who is under the *potestas* of the heir, or of the legatee, or he under whose *potestas* the heir himself, or legatee is, and any one who is under the same *potestas* as the heir, or legatee, can be summoned as a witness and *libripens*; as also the heir himself or the legatee can legally be. But still, so far as this extends to the heir, and any one under his *potestas*, or the person under whose *potestas* he may be, we ought to make use of this right very rarely.

(d) Huschke says that the second "potestate," which is not to be found in the MS., is as much out of place as the "aut" and "in." As the latter has probably arisen from "aut," of which the copyist had taken "a" as the sign of "aut," it is simply to be read "qui in potestate heredis aut legatarii est;" just as we read subsequently "ipse aut legatarius."

DE TESTAMENTIS MILITUM.

109. Sed hæc diligens observatio in ordinandis testamentis militibus propter nimiam inperitiam constitutionibus Principum remissa est. Nam quamvis neque legitimum numerum

CONCERNING THE WILLS OF SOLDIERS.

109. But this extreme exactness in framing testaments has been dispensed with by the imperial constitutions in the case of military men, on account of their want of skill in such

testium adhibuerint, neque vendiderint familiam, neque nuncupaverint testamentum, recte nihilominus testantur. (e)

matters. For although they may have neither employed the legal number of witnesses, nor have sold their patrimony, nor have established their testament by *nuncupatio*, they are nevertheless considered to have made a valid will.

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(e) In regard to testaments made by soldiers, it is to be observed that when made *in the field*, all that was required was the definite expression of the will, and such a testament was deemed valid, not only whilst the person who made it continued in the army, but for one year after his honourable dismissal. This privilege accorded to the soldiers was one of the most ancient and most important in the Roman State. Before the time of the Twelve Tables, the soldier could dispose of his property; for he was able “in procinctu facere testamentum.” After the auspices were taken, the soldier might make his testament in the most informal manner. If this privilege had not been permitted to him he would have often died intestate. When the *auspicia* ceased to be taken this mode of making a testament must have fallen to the ground, and for a long time no new privilege of the kind seems to have been granted. In the time of the emperors it was revived by an imperial constitution, by which the privilege of making a will was extended to the utmost in favour of the soldier. No form was needed. He might make it by writing with his finger on the sand, or by using as ink the blood from his wound to write upon his shield. He could appoint any person whom he pleased as his heir, and the most remarkable variation from the established law was, that he might die partly testate and partly intestate, for the fundamental maxim of the law of inheritance, “Nemo pro parte testatus pro parte intestatus decedere potest,” was relaxed in his case. Justinian somewhat modified this, and limited the privilege of the soldier to the will made *in castris*, or when on an expedition.

Ulpianus says, “Milites quomodocumque fecerint testamenta valent, id est etiam sine legitima observatione. Nam principalibus constitutionibus permissum est illis, quomodocumque vellent, quomodocumque possent, testari. Idque testamentum quod miles contra juris regulam fecit, ita demum valet, si vel in castris mortuus sit, vel post missionem intra annum.” Ulp. tit. xxiii. 10.

110. Præterea permissum est iis et peregrinos et Latinos instituere heredes vel iis legare; cum alioquin peregrini quidem ratione civili prohibeantur capere hereditatem legataque, Latini vero per legem Juniam. (f)

110. Besides they are permitted to institute as heirs both peregrini and Latini, or to make bequests to them; although formerly the Peregrini were prohibited from taking the *hereditas* and legacies by the principles of the civil law, but the Latini by the *lex Junia*.

(f) See note on the *lex Junia*, sec. 22. lib. i. p. 39. et seq.

111. Cælibes quoque qui lege Julia (g) hereditatem legataque capere vetantur, item orbi, id est qui liberos non habent, quos lex *Papia plus quam semissem capere* prohibet.

111. Unmarried persons also are prohibited by the *lex Julia* from taking either the *hereditas* or legacies, the same is the case with *orbi*, that is those who are childless, whom the *lex Papia* forbids from acquiring more than one half of the *hereditas*, and legacies bequeathed to them.

(g) Gaius here refers to the *lex Julia* “de maritandis ordinibus” passed in the year of Rome 757. See note in book 1. 178. Cælebs or Cœlebs is a term only applied to men; and it denoted those men who remained unmarried. Gai. in loco. and ss. 144, 286. Ulp. tit. viii. 6.; xvii. 1.; xxii. 3. In these passages Ulpianus speaks of the Cælebs as being in regard to legacies under the same disabilities as the *spado*, and as the *Latinus Junianus*. 1. 3. Cod. de in viduit. et de leg. Jul. etc. (6. 40.) Tit. Cod. (8. 58.) A Cælebs could not take an *hereditas* or a legacy, unless he married within one hundred days from the time it vested in him. “Si Cælebs . . . nec intra dies certum legi paruerit.” Ulp. tit. xvii. 1.

112. *Sed senatus divo Hadriano auctore, ut supra quoque significavimus, mulieribus etiam coemptione non facta testamentum facere permisit, si modo majores facerent annorum XII tutore auctore; scilicet ut quæ tutela liberatæ non essent ita testari deberent.* (h)

112. But the senate has, by the authority of Hadrian, permitted women, as we have said, to make a testament without concluding a *coemptio*, if they are above twelve years of age and they act under the authority of their tutors; so that those women who are not freed from the *tutela* ought to make their testaments in this way.

(h) Huschke is of opinion that Gaius is here speaking of the provision of the *senatus consultum* which exempted women from the *coemptio*, in order to their attaining the *testamenti factio*; and conjectures the reading of this section to be that which we have italicised in the text. Under the early Roman law women had recourse to the “*fiduciaria coemptio*,” to enable them to make a valid testament. See Bk. 1. sec. 115a.; also Frag. XII Tab. v. 3. Cic. de Invent. ii. 50. sec. 148.

113. *Videntur ergo melioris conditionis esse feminae quam masculi: nam masculus minor annorum XIII testamentum facere non potest, etiamsi tutore auctore testamentum facere velit; femina vero post XII annum testamenti faciendi jus nanciscitur.* (i)

113. Women therefore appear to be in a better condition than men; for a male of less than fourteen years of age, cannot make a will, although he may wish to make it with the sanction of his tutor; but a woman after attaining twelve years of age has gained the right of making a will.

(i) The Codex has after the word “*faciendi*” two obscure marks which the critics cannot with certainty decipher, but without doubt “*ta*,” the letters which would stand for *tutore auctore*, are in the MS. Gaius, indeed, could not omit these words, if he wished to state accurately the extent of the superior privilege enjoyed by females over males, and in connection with what he had previously mentioned See Huschke’s *Kritik. in loco*.

114. *Igitur si queramus an valeat testamentum, imprimis advertere de*

114. When we therefore enquire whether a testament is valid, we

bemus an is qui id fecerit habuerit testamenti factionem: (j) deinde si habuerit, requiremus an secundum juris civilis regulam testatus sit: exceptis militibus, quibus propter nimiam imperitiam, ut diximus, quomodo velint vel quomodo possint, permittitur testamentum facere.

ought in the first instance to examine if the party who has made it had the legal power (*testamenti factio*). Then if he have this qualification, we must ascertain whether he has made his will in accordance with the rules of the civil law. Soldiers are exempted from this, and as we have said, on account of their very great want of skill in such matters, are allowed to make a will in whatever way they wish, or may be able.

(j) *Testamenti factio*. No person could make a Will at Rome unless he possessed what was technically denominated the *testamenti factio*. As a general rule in Roman law every legal person had the right to make a testament. Hence, it is the exception to this rule to which attention must be more particularly directed. It has been observed that the term "*testamenti factio*" was used in different and distinct senses. It had three meanings: 1. It was employed to denote the person competent to make a Will, in which sense it was said to be the "*testamenti factio activa*." It is of this that Gaius speaks in the text. 2. The term was employed to denote fitness to be the legal object of the testator's thoughts in his Will, and in this sense it was said to be the "*testamenti factio passiva*." Hence, it was said, "*Testamenti autem factionem non solum is habere videtur qui testamentum facere potest, sed etiam qui ex alieno testamento vel ipse capere potest vel alii adquirere, licet non possit facere testamentum, et ideo furiosus et mutus et postumus et infans et filius-familias et servus alienus testamenti factionem habere dicuntur.*" Ins. s. 4. de her. qual. et dif. (2. 19). 3. The term however was not only applied in the manner just explained, but it was also used to denote those persons who were held to be legally competent as witnesses at the solemn and formal making of a Roman testament. Thus Justinian says, "*Testes adhiberi possunt ii, cum quibus testamenti factio est.*" Ins. s. 6. de test. ord. (2. 10.) In

this sense, as we learn from the Institutes, were excluded women, impuberes, slaves, lunatics, deaf and dumb persons, those under the *bonorum interdictio*, and those “quem leges jubent improbum intestabilemque esse.” s. 6. de test. ord. (2. 10.) In the later civil law those who were deaf or dumb could be legal witnesses. *Intestability* is the very opposite of the “testamenti factio.” Hence Ulpianus says, “Intestabilis sit; ergo nec testamentum facere poterit, nec ad testamentum adhibere.” l. 18. s. 1. Dig. qui test. fac. pos. (28. 1.) It was an essential requisite to a valid testament that the heir should possess the “testamenti factio;” and the *form* also was invalid if the witnesses had not this qualification. If the testator lost the “testamenti factio” after having made his will, the testament was termed *irritum*. “Irritum fit testamentum, si testator capite deminutus fuerit aut si jure facto testamento nemo exstiterit heres,” etc. Ulp. tit. xxiii. secs. 4, 5. Both the *familiæ emptor* and the *libripens* must have the “testamenti factio.” If a man was uncertain as to his actual legal condition, he had not the “testamenti factio.” “Qui de statu suo incertus est factus, quod patre peregre mortuo ignorat, se sui juris esse, testamentum facere non potest.” Ulp. tit. xx. 11. Boecking’s Instit. p. 227. Herrmann’s hand-lexicon, sub voce “Factio.” See also the note on this subject in i. 40.

115. Non tamen, ut jure civili valeat testamentum, sufficit ea observatio quam supra exposuimus de *familiæ venditione* et de *testibus* et de *nuncupationibus*.

115. It does not suffice for the validity of a will, according to civil law, to observe what has been said with reference to the sale of the *familia*, the number of witnesses and the *nuncupatio*.

116. Ante omnia requirendum est an institutio heredis sollemni modo facta sit: nam aliter facta institutione nihil proficit *familiam* testatoris ita venire, testesque ita adhibere, aut

116. We must at the very outset enquire whether the institution of the heir has been effected in the solemn manner prescribed; for if it has been done otherwise, the sale of

nuncupare testamentum, ut supra diximus.

117. Sollemnis autem institutio hæc est: TITIVS HERES ESTC. Sed et illa jam conprobata videtur: TITIVM HEREDEM ESSE JUBEO. At illa non est conprobata: TITIVM HEREDEM ESSE VOLO. Set et illæ a plerisque inprobatae sunt: HEREDEM INSTITVO, item HEREDEM FACIO.

118. Observandum præterea est, ut si mulier quæ in tutela sit faciat testamentum, tutoris auctoritate facere debeat: alioquin inutiliter jure civili testabitur.

119. Prætor tamen, si septem signis testium signatum sit testamentum, scriptis heredibus secundum tabulas testamenti *bonorum possessionem* pollicetur: (k) et si nemo sit ad quem ab intestato jure legitimo pertineat hereditas, velut frater eodem patre natus, aut patruus aut fratris filius, ita poterunt scripti heredes retinere hereditatem. Nam idem juris est et si alia ex causa testamentum non valeat, velut quod familia non venierit aut nuncupationis verba testator locutus non sit.

the *familia* of the testator, the presence of the witnesses, and the nuncupation of the testament, of which we have spoken before, are all equally inoperative.

117. The following is the formula for the solemn institution: "Let Titius be my heir;" and this also appears equally approved: "I command (*jubeo*) that Titius be my heir;" but this form of expression is not admissible: "I wish (*volo*) that Titius be my heir." These also are rejected by most—"I institute (*instituto*) such an one my heir," and "I make (*facio*) such an one heir."

118. Moreover, it must be observed that if a woman who is under the *tutela* would make a will, she must make it under the authority of her tutor; otherwise it will be inoperative according to the civil law (*jus civile*).

119. Yet, if the testament is sealed with the seals of seven witnesses, the prætor grants the possession of the property bequeathed to the heirs mentioned in the will (*secundum tabulas*) on the ground of the testament; and if there be no one to whom the *hereditas* legally belongs through intestacy, as for example, a brother born by the same father, or a paternal uncle, or a son of a brother, the heirs thus designated could retain the *hereditas*. The same holds good, if the testament is not valid from any other cause, as for example, because the testator has not sold the *familia*, or has not pronounced words of *nuncupatio*.

(k) The *bonorum possessio* is defined by Ulpianus as the right of suing for or retaining a patrimony or thing which

belonged to another at the time of his death. “*Bonorum igitur possessionem ita recte definimus: jus persequendi retinendique patrimonii, sive rei, quæ ejusque, quum moritur fuit.*” l. 3. s. 2. de bon. pos. (37. 1.) As Mr. Long observes, the strict laws of the Twelve Tables as to inheritance were gradually relaxed by the prætors’ edict, and a new kind of succession was introduced, by which a person might have a *bonorum possessio* who could have no *hereditas* or legal inheritance. Art. bon. pos. Dict. Gr. and Rom. Antiq. The germ of the *bonorum possessio* is hidden in some obscurity, and there have been a number of hypotheses as to its origin. The injustice of the strict law of inheritance was without doubt at times severely felt; and the rigour of the *jus civile* did not allow of the prætors introducing by a single act an entirely new code of laws upon the subject. What first took place was probably this: upon the presentation of a *hereditatis petitio* the prætor ascertained who was the person entitled to the property, and by his decision regulated the possession accordingly. So long as the forms of procedure known as the “*legis actiones*” continued, the “*hereditatis vindicatio*” and the “*rei vindicatio*” terminated in the same result, and by means of the “*hereditatis vindicatio*” the right to the property was settled. But when the new mode of procedure arose by means of the *formula*, and the “*rei vindicatio*” could only be instituted by a non-possessor, it had to be ascertained previously who was in possession, and the decision of this point was probably the first interference of the prætor in relation to the *bonorum possessio*. The *bonorum possessio* gave no right of inheritance, and the party obtaining it was never regarded as heir, but as “*in heredis loco.*” The “*interdictum adipiscendæ possessionis*” would at times have not only the effect of determining the possession for the time being, but when there was no heir the person who obtained the possession would without doubt gain the estate. In this way a new legal institution was built up. The *bonorum possessio* at its commencement was “*juris civilis adjuvantis gratia;*” then, as

the legal life of the nation advanced, it came to be “*supplendi juris civilis gratia* ;” and in its final development it was “*corrigendi juris civilis gratia*.” See on this view Von Vangerow’s *Pandecten*, vol. ii. s. 398, where the views of different jurists are presented and examined. *Leist. hist. bon. pos. sec. tab.* Goett. 1841, and by the same author, “*Die bon. pos. ihre geschichtl. Entwicklung und heutige Geltung*” Goett. 2 vols. 1844, 1848, where will be found the best discussion of this important subject.

Again, it should be remembered that during the time of the classical jurists the *bonorum possessio* existed as a comprehensive and complete system of Inheritance, not merely supplying the defects of the *hereditas* by the *jus civile*, but as a system perfect and independent in itself. From the time of its establishment it continued, with modifications to be presently explained, until the close of the Roman empire. It was a remarkable fact that there should exist among the same people what has been denominated a dualismus, or two distinct modes of inheritance—*hereditas* and *bonorum possessio*. These two systems differed in three points — not necessarily and always, but possibly and at times: namely, as to *persons*, the *mode of acquisition*, and as to *scope* and *operation*. As to the persons entitled to the inheritance by the *bonorum possessio*, they were not always different from those who took by the *hereditas*. The main distinction was this: *hereditas* was based on strict *agnatio*; *bonorum possessio* on *cognatio*, and it also respected the neglected rights of the wife. In testamentary succession the *bonorum possessio* was a much freer and more elastic system; on the other hand, the rules which regulated the succession to the *hereditas* were exceedingly exact and strict.

A further distinction that marked these two systems related to the different modes of acquisition; and here the strictness was on the side of the *bonorum possessio*, and the freedom on the side of the *hereditas*. To secure the succession by virtue of *hereditas*, all that was required was some act of will on the part of the heir or heirs who claimed

under the *jus civile*. Neither form nor time was deemed of importance. It was quite different with the *bonorum possessio*. To enter upon an estate required the especial intervention of the prætor, which as the rule, must be sought by the bonorum possessor, within one hundred days (*centum diebus*). To obtain the judgment of the prætor, the person claiming was obliged to notify the judge, and to obtain his interference and his aid by the presentation of a petition.

Finally, in regard to the scope or operation of these two modes of inheritance, in all real and essential results they were the same. But in some minor respects there was a difference. Both the bonorum possessores and the heredes, obtained a "universal succession." The heir, however, who obtained the estate, held it *ex jure Quiritium*, and all the actions for or against the testator were valid against his successor by the *jus civile*. On the other hand, the bonorum possessor acquired only the "bonitarian ownership" of the property, even when the person whom he succeeded had held his estate in quiritarian ownership. All the actions for and against him were simply *utiles actiones*, a term employed to denote the action given by the prætor, and the opposite of the *actio directa* given by the *jus civile*. So far the advantages of the bonorum possessor, were by no means on a par with the legal heir, but he enjoyed a great advantage over him, in the right to what was denominated the "*interdictum quorum bonorum*." The following was the form of this interdict:—"Ait prætor: quorum bonorum ex edicto meo illi possessio data est, quod de his bonis pro herede aut pro possessore possides, possideresve si nihil usucaptum esset, quod quidem dolo malo fecisti uti desineres possidere, id illi restituas." l. 1. pr. Dig. quo. bon. (43. 2.) The person who obtained the *bonorum possessio* became entitled to the "*interdictum adipiscendæ possessionis*," by the aid of which any person who had actual possession of the property could be compelled, in a summary manner, to surrender it to another claimant. This was a great privilege for the bonorum possessor, and there was nothing corresponding to it

which appertained to the heir. Its operation was to compel a person who held possession of the property, of which *bonorum possessio* was granted to another, to give it up to the claimant, and that whether the person in possession of the property held it "pro herede," or "pro possessore." Thus, Ulpianus says, "Hoc interdictum restitutorium est, et ad universitatem bonorum, non ad singulas res pertinet; et appellatur Quorum bonorum, et est adipiscendæ possessionis *universorum bonorum*." 1. 1. Dig. tit. cit. (43. 2.)

These two systems, as already observed, existed quite separately from each other, but as independent modes of inheritance valid at the same period. When one and the same person was entitled to the *bonorum possessio*, and to the *hereditas* of a deceased person, there arose no difficulty, for such a person had the advantages of both systems, and was especially favoured by being entitled to the "interdictum quorum bonorum." It would, however, sometimes happen, that one person was entitled to the *bonorum possessio* and another by the *jus civile*, to the *hereditas*. When this conflict of interest arose there was no general principle nor fixed rule by which it was possible to determine which party must succumb; but each case was decided upon its own merits. The system which succeeded practically took the technical phrase *cum re*, and the one that failed, *sine re*. Thus, if there were an *hereditas cum re*, there must be a *bonorum possessio sine re*, and so *vice versa*. It is quite erroneous to assert, as some have, that in doubtful cases the possessor *cum re* succeeded. To take an illustration. A man died and left an emancipated son, and a "proximus adgnatus." The *jus civile* did not concern itself at all with the emancipated son, but called the nearest agnate to the inheritance: in such a case the prætor interfered, and so to speak, cancelled or struck out the "capitis deminutio" of the emancipated son, giving the possession and enjoyment of the inheritance to him not as heir; but as the *bonorum possessor*. Thus he took the *bonorum possessio cum re*, and the "proximus adgnatus" had the *hereditas sine re*. It

was, it must be observed, quite different from his being a *non heres*, for he had the "*hereditatis petitio*," and though he failed to defeat the bonorum possessor he would succeed in an action against any third party. He was only excluded from the inheritance by the bonorum possessor *cum re*.

Finally, these two systems existed as a dualismus for several centuries; until in the later Roman law an important alteration was introduced. The bonorum possessio was not abolished, but there was a fusing together or union of the two prevailing systems, and the result was the creation of a new law of inheritance, in which the ideas and principles of the prætorian law as found in the bonorum possessio were transferred to the hereditas arising out of the *jus civile*. In this way the strictness of the *jus civile* was for ever abolished. The prætorian system was employed to remedy the defects and to fill up, so to speak, the gaps in the hereditas. By the 118th Novella of Justinian this great change was accomplished. The bonorum possessio did not become antiquated, nor had the hereditas ceased to be a practical system, but an entirely new law of Inheritance arose, which to take a homely illustration was not unlike a single garment made from the best parts of two old ones. What was deficient in one system was supplied by piecing out from the other. The hereditas was the practical system, but when this failed, and parties equitably entitled to the inheritance would have got nothing on account of the strict law, the *bonorum possessio* by its more flexible methods gave them the inheritance. Not that there existed any longer two systems, as there had been during the prætorian period. There was finally established one, and only one, law of inheritance for the empire.

120. Sed videamus an *non*, (1) etiamsi frater aut patruus extant, potiores scriptis heredibus habeantur. Rescripto enim Imperatoris Antonini significatur, eos qui secundum tabulas testamenti non jure factus bono-

120. But, let us see whether or not if a brother or a paternal uncle is living, their claim would be preferred to that of the instituted heirs. It is provided by a rescript of the Emperor Hadrian, that those who

rum possessionem petierint, posse adversus eos qui ab intestato vindicant hereditatem defendere se per exceptionem doli mali.

have claimed possession of property according to the provisions of such a testament, not made in strict accordance with law, could defend themselves by the *exceptio doli mali*, against those who claim the inheritance by intestacy (*ab intestato*.)

(1) Huschke affirms that Gaius intends to say that if a brother or father's brother were living, he would be preferred to the instituted heir, but that from the peculiarity of the expression *videamus an*, he says the very opposite, for the sentence as written is negative; to make it affirmative we must insert the word *non*, or we might say *videamus ne*. Thus Ulpianus says, "Videamus an nihil mihi exceptio prosit: for it follows in opposition to "puto autem, huic exceptionem non prodesse." See also Paulus l. 32. sec. 1; Dig. de inoffic. test. (5. 2.) Speaking of a "suus heres" who has inherited a legacy, he says that he could not be excluded from the "Querela;" the word "enim" introduces the reasons and there follows as the antithesis "tutius tamen fecerit, si se abstinuerit a petitione legati." The letter *n* standing in the manuscript for *non* which has been lost in the word *an* is restored in the lex, and the amended reading is "Sed videamus an *non* etiamsi, etc." In the following section where the words "*an autem et ad ea testamenta feminarum, quæ sine tutoris auctoritate fecerint, hæc constitutio pertineat, videbimus*" occur, a similar emendation is not required, for here Gaius intends that the proposition should be negative.

121. Quod sane quidem ad masculorum testamenta pertinere certum est; item ad feminarum quæ ideo non utiliter testatæ sunt, quod verbi gratia familiam non vendiderint aut nuncupationis verba locutæ non sint; an autem et ad ea testamenta feminarum quæ sine tutoris auctoritate fecerint hæc constitutio pertineat, videbimus.

121. This decision certainly applies to testaments made by males, as well as to those of women, who have made an inoperative will, either because they have not sold their *familia*, or not employed words of *nuncupatio*. But whether this constitution applies to the testaments of women made without the *auctoritas* of their tutors, remains to be seen.

122. Loquimur autem de his scilicet feminis quæ non in legitima parentium aut patronorum tutela sunt, sed de his quæ alterius generis tutores habent, qui etiam inviti coguntur auctores fieri: alioquin parentem et patronum sine auctoritate ejus facto testamento non summoveri palam est.

123. Item qui filium in potestate habet curare debet, ut eum vel heredem instituat vel nominatim exheredet; alioquin si eum silentio præterierit, inutiliter testabitur: adeo quidem, ut nostri præceptores existiment, etiamsi vivo patre filius defunctus sit, neminem heredem ex eo testamento existere posse, scilicet quia statim ab initio non constiterit institutio. Sed diversæ scholæ auctores, siquidem filius mortis patris tempore vivat, sane impedimento eum esse scriptis heredibus et illum ab intestato heredem fieri confitentur: si vero ante mortem patris interceptus sit, posse ex testamento hereditatem adiri putant, nullo jam filio impedimento; quia scilicet existimant non statim ab initio inutiliter fieri testamentum filio præterito.

122. We speak specially of women who are not under the legitimate guardianship of their ascendants or patrons, but who have tutors of another kind, who can be compelled against their will to interpose their *auctoritas*: otherwise it is clear that an agnate ascendant and patron, is not superseded by a testament made without his authority.

123. Again, he who has a son under his *potestas* must take care that he either institutes him heir, or disinherits him by name; otherwise if he pass him by in silence, the testament will be inoperative, so that as the doctors of our school teach, even if the son die during the lifetime of his father, no one can become heir under this testament, principally, because the institution was invalid from the very commencement. But the jurists of the opposite school think that the son, if he be living at the time of the death of his father, stands in the way of the party instituted heir, and becomes heir by intestacy; but if he be dead before the time of the decease of his father, they hold that the *hereditas* can be entered upon in virtue of the testament, since the son can no longer be an obstacle, because they are certainly of opinion, that the testament is not inoperative from the first (*ab initio*) by the omission of the son. (*m*)

JUST. II. 13. pr.

(*m*) From section 123 to 137, Gaius treats of disinherison. There were certain persons whom it was not in the power of the testator to disinherit, by simply passing them over and instituting an heir. They could still inherit and their omission rendered the testament inoperative.

If such persons were to be excluded, it must be done by express words, declaring that they should not inherit: as “*exheres esto : exheredes sunt.*” When words were thus expressly employed, a person otherwise entitled might be the subject of disinherison (*exhereditio*). There could be no conditional disinherison, except when an heir was instituted under a condition, and the party disinherited was set aside in favour of the person instituted. Such disinherison must, in the very nature of the case, stand in connexion with a conditional institution, if the condition were not purely a “*conditio potestiva*.” l. 46. sec. 1. and l. 86. Dig. de hered. inst. (28. 5). According to the *jus civile* the above held true in the case of the *sui*, both the “*sui liberi*,” as also “*postumi*,” unless they were expressly excluded by the testator. In the case of sons (*fili*), disinherison was required to be made *nominatim*. That is to say, special and distinct persons must be pointed out, although their actual names need not be mentioned. We learn from Gaius that it sufficed for daughters and grandchildren, if, after the institution of the heir, the testator disinherited them as a class. This he could do by using the following words: “*ceteri exheredes sunt* ;” this was called “*exhereditio inter ceteros*.” It was, however, necessary that something should be left to posthumous children, so as to show that they were in the mind of the testator. Ulpianus says, “*Postumus filius nominatim exheredandus est ; filia postuma ceteræque postumæ feminae vel nominatim vel inter ceteros ; dummodo inter ceteros exheredatis aliquid legetur*.” Tit. xxii. sec. 21. Justinian made it necessary to disinherit all *sui nominatim*. By the prætorian law, disinherison was required to be made *nominatim* in the case of sons and grandsons. Women, however, might be disinherited *inter ceteros*; but if they were passed over, the prætor gave the “*bonorum possessio contra testamentum*.” The effect of this was to compel the institution of the heir in favour of the bonorum possessores, who stood in the place of the instituted heirs. The testament was thus not rendered invalid, nor were the pupillary sub-

stitutions set aside. Justinian extended the necessity of non-preterition to all descendants, *sui* or not, who might be entitled, as well as to ascendants, and he required the allegation of a distinct reason as the ground for disinherison. He established fourteen reasons as grounds for disinheriting descendants, and eight for ascendants. By an edict of Augustus, a soldier-son (*filius miles*) could not be disinherited at all. This edict was subsequently repealed. l. 11. Dig. de lib. et posth. (28. 2.) Cic. de Orat. 1. 38. Ulp. xxii. 16. 20—22. Pr. Jus. de exhered. (2. 13.) Dig. xxxvii. 4. De bonorum possessione contra tabulas. Cod. vi. 12. de bonorum possessione contra tabulas, quam prætor liberis pollicetur." l. 19. Dig. de bon. pos. cont. tab. (37. 4.) Nov. 115. and Puchta's Instit. vol. iii. 246—249. 291—295.

124. Ceteras vero liberorum personas si præterierit testator, valet testamentum. Præteritæ istæ personæ (n) scriptis heredibus in partem adrescunt: si *sui* instituti sint in virilem; si extranei, in dimidiam. Id est si quis tres verbi gratia filios heredes instituerit et filiam præterierit, filia adrescendo pro quarta parte fit heres; placuit enim eam tuendam esse pro ea parte, quia etiam ab intestato eam partem habitura esset. At si extraneos ille heredes instituerit et filium præterierit, filia adrescendo ex dimidia parte fit heres. Quæ de filia diximus, eadem et de nepote deque omnibus liberorum personis, sive masculini sive feminini sexus, dicta intellegemus.

124. But if the testator have only omitted the other children, his testament is valid. The children thus omitted from the instituted heirs obtain a portion of the inheritance. If those instituted are of the testator's family (*sui*), they take the share of a male (*in virilem*), but if the instituted heirs are not relatives (*extranei*), the half; that is to say, if any one has for example, instituted his three sons and omitted his daughter, the daughter becomes heiress, and is entitled to a fourth; for it has been determined that her interest should be protected to this extent, since she is entitled to this portion, by intestacy. If on the other hand the testator has instituted strangers (*extranei*) as his heirs, and has passed by his daughter, the daughter becomes heiress and is entitled to a moiety of the inheritance. What we have said of the daughter is to be understood as equally applicable to a granddaughter, and to all other children, both of the male and female sex.

(n) *Præteriti* were persons whom the testator was bound to regard when he made his will. All *sui* heredes had to be formally disinherited, if they were not instituted as heirs. If the testator failed to do this, his testament became null and void. The principle which regulated the law was this; according to the Roman idea, the *sui* were *ipso jure*, i. e., of very necessity, upon the death of the *parens*, his natural and lawful heirs. Thus, a *filius suus* could not be passed over without the omission proving fatal to the will. The præterition of the other *sui* modified the will in such a way as to benefit those who were omitted in the testament. Thus a daughter or a grandchild was entitled to share the inheritance with the instituted heir. If *sui* were instituted, those omitted took amongst them the “*pars virilis*,” i. e., one portion equal to that given to each of the parties having a concurrent right to the inheritance, thus, as it were, increasing the number of *sui* heredes by one. If the heirs instituted were *extranei*, then those passed over by the testator took the “*pars dimidia*,” or, one-half the inheritance. Ulpianus says, “*Ex suis hereditibus filius quidem neque heres institutus, neque nominatim exheredatus, non patitur valere testamentum. Reliquæ vero personæ liberorum velut filia, nepos neptis, si præteritæ sint, valet testamentum, quo scriptis hereditibus adcrecent, suis quidem in partem virilem, extraneis autem in partem dimidiam.*” Tit. xxii. 16. 17. *Filio et extraneo æquis partibus hereditibus institutis, si præterita accrescat, etc.* Paul. Sent. Rec. III. iv. b. 8. For the meaning of the term “*Extraneus*” see note to ii. 162.

125. Quid ergo est? licet *feminæ* secundum ea quæ diximus scriptis hereditibus dimidiam partem tantum detrahant, tamen Prætor eis contra tabulas bonorum possessionem promittit, qua ratione extranei heredes a tota hereditate repelluntur: et efficeretur sene per hoc bonorum

125. What is the practical result? Although women in accordance with what we have said, subtract only one half of the *hereditas* from the heirs instituted by the testament, still the prætor promises them the possession of the property, in opposition to the words of the will, (*com-*

possessionem, ut nihil inter feminas et masculos interesset. (p)

tra tabulas) on which account heirs who are not members of the *familia* are deprived of the entire *hereditas*; and the operation of the *bonorum possessio* is clearly this, that it makes no distinction between either males or females.

(p) By emancipation a child having passed out of the *familia* and ceasing thus to be a *suus heres*, lost all claim to the inheritance by the *jus civile*. As a remedy the prætor set aside the testament, not as invalid, but by granting the *bonorum possessio*, which gave the emancipatus possession *contra tabulas*. This at times operated greatly for the advantage of an emancipated daughter; since, the testament being set aside, she would, if an only child, get possession of all the property; but if an unemancipated daughter were passed over, she would only receive the half at most. See sec. 124. The effect of the imperial rescript referred to in the next section was to place both on an equality by giving to the emancipated daughter the “*dimidia pars*” only, just as if she had remained in the *familia*.

126. Sed nuper Imperator Antoninus, significavit rescripto suas non plus nancisci feminas per bonorum possessionem, quam quod jure adcrescendi consequerentur. Quod in emancipatis feminis similiter obtinet, scilicet ut quod adcrescendi jure habituræ essent, si suæ fuissent, id ipsum etiam per bonorum possessionem habeant.

126. But the Emperor Antoninus has recently decided in a rescript, that females who are suæ (*suæ feminæ*) shall not obtain by the *bonorum possessio* more than would accrue to them by the *jus accrescendi*. In a similar way this applies to emancipated women, so that what they would have had by the *jus accrescendi*, if they had been *suæ feminæ*, they will now have secured to them by the *bonorum possessio*.

127. Sed si quidem filius a patre exheredetur, nominatim exheredari ante heredis institutionem potest exheredari. (q) (vel inter medias quoque heredum institutiones, set inter ceteros omnino non.) Nominatim autem

127. But if a son is disinherited by his father, he can only be disinherited by name, before the institution of the heir, (or in that part of the testament which contains the institution of the heirs, but he cannot be disin-

exheredari videtur sive ita exheredetur: TITIVS FILIVS MEVS EXHERES ESTO, sive ita: FILIVS MEVS EXHERES ESTO, non adjecto proprio nomine.

herited by the term "amongst others" *inter ceteros*). It appears that he is disinherited by name, when he is thus disinherited—"My son Titius shall be disinherited," or thus, "Let my son be disinherited," without the addition of the proper name.

(q) Huschke, following Boecking, proposes to read in the defective part of this section, "Sed si quidem filius a patre exheredetur, nominatim exheredari ante heredis institutionem potest." Lachmann, on the other hand, proposes to read, "Sed si, etc. . . . nominatim exheredari apte potest, aliter vero non potest exheredari." Huschke, commenting on the reading suggested by Lachmann, says, the statement that "the son can be properly disinherited *nominatim*, but that he cannot otherwise be disinherited," is but a feeble opposition. He is, however, of opinion that some words are omitted, and suggests the following reading: "nominatim exheredari (debet, itaque et) ante heredis institutionem potest exheredari." In his last edition of Gaius he has inserted a very similar conjectural reading: "nominatim exheredari (debet quo modo) ante heredis institutionem potest exheredari." Kritik. pp. 40, 41. Studien, p. 253. Gaius in loco. p. 162. Boecking, note 1. p. 111.

128. *Masculorum ceterorum personæ vel feminini sexus aut nominatim exheredari possunt, aut inter ceteros, velut hoc modo: ceteri exheredes sunt: quæ verba post institutionem heredum adici solent. Sed hæc ita sunt jure civile.*

128. Other persons of both sexes may be disinherited either by name or *inter ceteros*, that is, in the following manner:—"The remainder of my children shall be disinherited" (*ceteri exheredes sunt*): which words are usually added after the institution of the heir. But these things are so in the civil law (*jus civile*) only.

129. Nam prætor omnes virilis sexus, tam filios quam ceteros, id est nepotes quoque et pronepotes nominatim exheredari jubet, feminini vero inter ceteros: qui nisi fuerint ita ex-

129. For the prætor ordains that all persons of the male sex, both the sons as well as others, that is, the grandchildren and the great-grandchildren, should be disinherited by

heredati, promittit eis contra tabulas bonorum possessionem.

name, but the children of the female sex *inter ceteros*; and promises to the latter, if they are not thus disinherited, the possession of the property (*bonorum possessio*) in opposition to the will.

130. Postumi quoque liberi *vel heredes institui debent vel exheredari.* (r)

130. Posthumous children ought to be either instituted as heirs, or disinherited.

(r) *Postumus* is properly the superlative of *posterus*, and is erroneously derived from *post* and *humus*. It denotes in classical Latin "late born." See the well-known passage, Virg. *Æn.* 6. v. 763: "*Silvius . . . tua postuma proles quem tibi longævo serum, etc.*" Varro de Ling. Lat. ix. 38. s. 60: says, "*Is qui post patris mortem natus est, dicitur Postumus.*" That the word had however a wider signification, and included more than we denote by the word "posthumous" is clear from Cæs. Vind. in Gell. ii. 16. 5. and from Ulpianus, who asks "if any one has assigned tutors to his *postumi*, and they are born *during his own lifetime*, does the appointment hold good?" l. 16. fin. Dig. de test. tut. (26. 2.)

131. *Et in eo par omnium condicio est, quod et in filio postumo et in quolibet ex ceteris liberis, sive feminini sexus sive masculini, praterito, calet quidem testamentum, sed postea agnatione postumi sive postuma rumpitur, et ea ratione totum infirmatur: ideoque si mulier ex qua postumus aut postuma sperabatur abortum fecerit, nihil impedimento est scriptis hereditas vel institutio adhibenda.* (s)

131. And in this case the condition of all is the same; because if a posthumous son, or any descendant of the male or female sex, is passed over, the testament is indeed valid; but afterwards by the agnation of a posthumous male or female child, its legal force is broken, and on that account it is entirely invalidated. Therefore, if a woman from whom a posthumous son or daughter was expected, has miscarried, there is nothing to prevent the instituted heirs entering upon the inheritance.

JUST. ii. 13. 1.

(s) In the MS. page cxxiv. *b* part of the previous page,

and page cxxiii. *a*, in the whole 36 lines, cannot be deciphered. Goeschen thinks these sections may be supplied from the Institutes of Justinian, and they have accordingly been inserted in the text. Secs. 133 and 134 are also found in the Digest. l. 13. Dig. de injusto rupto (28. 3.) In the Epitome Gai. we find the following: "Is qui filios in potestate habet curam gerere debet, ut testamentum faciens masculum filium aut nominatim heredem instituat, aut nominatim exheredet; nam si masculum filium testamento præterierit, non valebit testamentum. Si vero filiam præterierit, non rumpet testamentum filia prætermissa: sed inter fratres suos, legitimo stante testamento, suam, sicut alii fratres, consequitur portionem; si vero testamento extranei heredes scripti fuerint, stante testamento, filia medietatem hereditatis adquiret. Nam si facto testamento in quo masculus filius prætermisus est evenerit, ut, vivente adhuc patre, filius qui prætermisus est moriatur, sic quoque, quamlibet filius ille mortuus fuerit, testamentum quod factum est non valebit. Postumorum duo genera sunt: quia postumi adpellantur hi qui post mortem patris de uxore nati fuerint, et illi qui post testamentum factum nascuntur. Et ideo, nisi is qui testamentum facit in ipso testamento comprehenderit: quicumque filius aut filia mihi natus natave fuerit, heres mihi sit; aut certe dicat, exheres sit, valere ejus non potest testamentum: quia, sicut superius jam dictum est, legitime concepti pro natis habentur; nisi quod melior est conditio postumæ, quam natæ; quia nata, si prætermisus fuerit, non rumpet testamentum: postuma vero, sicut masculus, testamentum rumpet. Compare Ulp. xxii. ss. 18—21. Cic. de orat. i. 57. Pro. Cæc. 25. Liv. l. 34. sec. 3.

132. *Sed feminini quidem sexus postumæ vel nominatim vel inter ceteros exheredari solent. Dum tamen si inter ceteros exheredentur, aliquid eis legatur, ne videantur per obliuionem præteritis esse. masculus vero*

132. But posthumous children of the female sex are usually disinherited either by name, or in the general clause (*inter ceteros*). But still if they are disinherited in the general clause, something should be left them as a

postumus, id est filium et deinceps, placuit non aliter recte exheredari, nisi nominatim exheredentur, hoc scilicet modo: quicumque mihi filius genitus fuerit, exheres esto.

legacy, lest it should seem that they were omitted through forgetfulness. But it has been determined that male posthumous children, i.e. sons and their direct descendants, are not legally disinherited, otherwise than by name, that is to say, in this form, "whatever son is hereafter born to me, let him be disinherited."

JUST. II. 13. 1.

133. *Postumorum loco sunt et hi qui in sui heredis locum succedendo quasi adgnascendo fiunt parentibus sui heredes. Ut ecce si filium et ex eo nepotem neptemve in potestate habeam, quia filius gradu præcedit, is solus jura sui heredis habet, quamvis nepos quoque et neptis ex eo in eadem potestate sint; sed si filius meus me vivo moriatur, aut qualibet ratione exeat de potestate mea, incipit nepos neptisve in ejus locum succedere, et eo modo jura suorum heredum quasi adgnatione nancisci.*

133. Those also are treated as posthumous children who, by succeeding to the position of a *suus heres*, become by this quasi agnation *sui heredes* to their ascendants. As for example, if I have a son, and by him a grandson or granddaughter under my *potestas*, the son, because he is first in degree, has alone the right of a *suus heres*, although the grandson and granddaughter by that son, are under the same *potestas*; but if my son die in my life time, or should pass in any other way from under my *potestas*, the grandson or granddaughter immediately succeeds to his place; and thus, by quasi agnation, obtains the rights of a *suus heres*.

JUST. II. 13. 2.

134. *Ne ergo eo modo rumpat mihi testamentum, sicut ipsum filium vel heredem institui vel exheredare nominatim debeo, ne non jure faciam testamentum, ita et nepotem neptemve ex eo necesse est mihi vel heredem institui vel exheredare, ne forte, me vivo filio mortuo, succedendo in locum ejus nepos neptisve quasi adgnatione rumpat testamentum: idque lege Julia Valeria præcisum est; (1) quæ simul cavetur, ut illi tanquam postumi id est*

134. Therefore, that the force of my testament may not be broken in this way, just as I ought either to appoint my son as heir, or disinherit him by name, in order that I may not make an illegal testament, so I am equally obliged to institute as heir, or to disinherit, a grandson or granddaughter by that son, lest by the death of my son during my life-time, and by the succession of my grandson or granddaughter in his place, my testa-

virilis sexus nominatim, feminini vel nominatim vel inter ceteros exheredentur, dum tamen iis qui inter ceteros exheredantur *aliquid legetur*.

ment fail through this quasi agnation. And this is provided for by the *lex Junia Velleia*, which at the same time has determined that male children shall be disinherited by name, but females either by name or *inter ceteros*, whilst yet something is bequeathed to those who are disinherited *inter ceteros*.

JUST. II. 13. 2.

(t) By this lex, passed in the reign of Augustus, A.U.C. 763, it was provided that a *suus heres* born in the lifetime of the testator, but after the making of his testament, might be instituted heir. By the old law the institution of an unborn child was admissible, nor could such be disinherited, as unborn children, both in regard to institution and disinherison, were regarded from the same legal point of view. The postumi, being thus ignored, gave rise to the conjecture that the testator had overlooked the possibility of such being born, but that if he had considered such possibility he would without doubt have made a different will. Testaments were therefore by the agnation of a postumus—that is, the birth of a child after the father had made his will—rendered invalid. Cic. de Orat. 1. 57.; pro Cæcina 25. In the course of time there arose certain exceptions, by virtue of which both the institution and disinherison of postumi born subsequently to the making of the will were considered valid. The lex referred to in the text modified the old law, so that those who were really born at the time of the making of the testament, might be subsequently, in consequence of the falling away of some intermediate member of the family, considered and treated as though they were postumi. Thus this law “so far modified the old law, that a person who by the death of an instituted heir after the testator had made his will, becoming a *heres quasi agnascendo* did not break the will, if he were instituted heres.” Ulpianus says, “Eos, qui in utero sunt, si nati sui heredes nobis futuri sint

possumus instituere heredes: si quidem post mortem nostram nascuntur, ex jure civile; si vero viventibus nobis ex lege Junia Tit. xxii. 19. Walter's Rechtsgeschichte, ss. 604. 616.

135. *Emancipatos liberos jure civili neque heredes instituere neque exheredare necesse est, quia non sunt sui heredes. Sed Prætor omnes, tam feminini quam masculini sexus, si heredes non instituuntur, exheredari jubet, virilis sexus filios et ulterioris gradus nominatim, feminini vero inter ceteros. Quodsi neque heredes instituti fuerint, neque ita, ut supra diximus, exheredati, Prætor promittit eis contra tabulas bonorum possessionem.* (v)

135. By the *jus civile* [there is no necessity either to institute emancipated children as heirs, or to disinherit them in a testament; since they are not *sui heredes*. For the prætor ordains that all children, both of the male and female sex, if they be not instituted heirs, are to be disinherited; the sons and more remote descendants of the male sex by name, the females under the general term *ceteri*; but if they have neither been instituted heirs, nor disinherited in the method we have above described, the prætor promises them the possession of the property in opposition to the provisions of the testament (*contra tabulas*).

(u) The bonorum possessio might be either “contra tabulas” or “secundum tabulas.” The prætor called to the inheritance the *liberi*, that is, the actual *sui* whom the testator had passed over, and their children (*descendentes*). The *descendentes* were treated as the *sui*, if they were not removed from his *familia* by mancipation or in some other way. Ulpianus says, “Contra tabulas bonorum possessio datur liberis emancipatis, testamento præteritis, licet legitima non ad eos pertineat hereditas.” The emancipati were admitted to the inheritance after the *sui*, but “conjungendi cum emancipato libero liberi ejus.” They received that which appertained to them as *sui*, but had to give one half to their children. The bonorum possessio *secundum tabulas* was given by the prætor in accordance with the words of the will, and to the persons whom the testator had named as his *heredes*, when there were no claimants entitled to the pro-

perty, or none who chose to set up their lawful claim. It was also given when there was some defect in the formalities, provided that there were seven proper witnesses to the will. Cicero says, “*Si de hereditate ambigitur, et tabulæ testamenti obsignatæ non minus multis signis, quam e lege oportet, ad me proferentur: secundum tabulas potissimum hereditatem dabo. Hoc translatitium est in Ver. i. 45.*” Ulpianus says, “*Si septem signis testium signatum sit testamentum licet jure civile ruptum, vel irritum factum sit, prætor scriptis heredibus juxta tabulas bon. pos. dat., si testator et civis Romanus et suæ potestatis quum moreretur, fuit.*” Tit. xxiii. sec. 6. Savigny observes that “when the *suns* or *postumus* who was passed over, died before the testator, still the testament was and remained null; but it received effect by the prætor granting a ‘*bonorum possessio secundum tabulas.*’ The nullity caused by the preterition was an absolute one by the *jus civile*. The prætor changed it into a relative one, so that it could be appealed to only by the living præteritus himself and not by a third party, for whose benefit it was introduced. The same thing took place if the testator erred by passing over an emancipated son, or by unjustly disinheriting a near relation entitled to succeed ‘*ab intestato,*’ only with this difference, that here the result followed of itself, not by any intervention of the prætor. For the emancipated person who was passed over had no more than a claim by ‘*bonorum possessio contra tabulas,*’ which was an entirely personal remedy offered to a præteritus alive at the opening of the succession.” See Savigny’s Private International Law, p. 327, and note translated by W. Guthrie, Edin. 1869.

135a. In potestate patre constituto, qui inde nati sunt, nec in accipienda bonorum possessione patri concurrunt qui possit eos in potestate habere; aut si petitur, non impetrabitur. Namque per ipsum patrem suum prohibetur. Nec differunt emancipati et sui.

135a. Hence those who are born of a father who is placed under the *potestas*, do not join with the father who may have them under his *potestas*, in receiving the *bonorum possessio*; nor if a petition is presented will it be granted. For they are precluded by the father himself, and

it makes no difference whether they are emancipated children or *sui*.

JUST. II. 13. 4.

136. *Adoptivi*, quamdiu tenentur in adoptionem, naturalium loco sunt; emancipati vero a patre adoptivo neque jure civili, neque quod ad edictum Prætoris pertinet, *inter liberos numerantur*.

136. Those who are adopted are regarded as natural children, so long as they are held in adoption, but after they have been emancipated by their adoptive father, they are neither numbered amongst his children by the civil law (*jure civile*), nor by the provisions of the prætorian edict.

137. Qua ratione accidit, ut ex diverso, quod ad naturalem parentem pertinet, quamdiu quidem sint in adoptiva familia, extraneorum numero habeantur. *Cum vero emancipati fuerint ab adoptivo patre, tunc incipiant* in ea causa esse qua futuri essent, si ab ipso naturali patre *emancipati* fuissent. (v)

137. For which reason it happens conversely, that adopted children so long as they remain in the adoptive family are considered *extranei* in what relates to their natural parent. But when they have been emancipated by their adoptive father, they at once assume the position which they would have held if they had been emancipated by their natural father.

JUST. II. 13. 4.

(v) See note on "Adoptio," i. s. 98.

138. Si quis post factum testamentum adoptaverit sibi filium, aut per populum eum qui *sui juris* est, aut per Prætores eum qui in potestate parentis fuerit omnimodo testamentum ejus rumpitur quasi adgnatione *sui heredis*.

138. If any one, after having made a testament, has adopted as his son, either by arrogation (*per populum*) one who is *sui juris*, or by adoption before the prætor one who is under the *potestas* of an agnate ascendant, his testament is absolutely destroyed by this quasi agnation of a *sui heres*.

JUST. II. 17. 1.

139. Idem juris est si cui post factum testamentum uxor in manum conveniat, vel quæ in manu fuit nubat: nam eo modo filiæ loco esse incipit et quasi sua est. (v)

139. The same holds good, if a man after he has made a testament, takes a wife *in manus*, or if a woman *in manus* marries, for in this case she is regarded in the place of a daughter, and she becomes a quasi *sua heres*.

(w) When a woman made a coemptio with a third person for the sake of a trust, "*fiduciæ causa*," she did not come "*in filiæ loco*." The testament was only rendered invalid when she came into the manus of her husband. See Gai. i. ss. 114, 115, and the notes to these sections.

140. *Nec prodest sive hæc, sive ille qui adoptatus est, in eo testamento sit institutus institutave. Nam de exheredatione ejus supervacuum videtur quærere, cum testamenti faciendi tempore suorum heredum numero non fuerit.*

140. It does not matter if the woman or man who has been adopted be instituted heir in that testament. For the question as to disinherison seems superfluous, since at the time of making the testament, they were not in the number of *sui heredes*.

141. *Filius quoque qui ex prima secundave mancipatione manumittitur, quia revertitur in potestatem patriam, rumpit ante factum testamentum. (x) Nec prodest si in eo testamento heres institutus vel exheredatus fuerit.*

141. Also the son, who is manumitted after the first or second mancipation, breaks the previous testament since he falls again under the *patria potestas*. Nor does it affect the question, whether he have been instituted heir, or disinherited in that testament.

(x) If something were originally wanting to the validity of a testament, it was spoken of as being *injustum*; i. e., it was *non jure factum*. A testament was called *imperfectum* if some formality were wanting, for example, in the case of a soldier's testament. Papinianus refers to the will of a *miles*, and in so doing gives a good example of an imperfect testament: "*Miles si testamentum imperfectum relinquat, scriptura, quæ profertur, perfecti testamenti potestatem obtinet, nam militis testamentum sola perficitur voluntate. Quique plura per dies varios scribit, sæpe facere testamentum videtur.*" l. 35. Dig. de test. mil. (29. 1.)

Again, a testament was said to be *nullius momenti* when it was *irritum*, or *inutile esse*, in opposition to *valere* or *vim habere*; if, for example, a *filius-familias* was passed over by the testator, in which case, on account of the *præteritus*, the will had no legal effect. Thus, Julianus

says, "Testamentum, quod hoc modo scribitur: Titius post mortem filii mei heres esto, *filius* exheres esto, *nullius momenti* est, quia filius post mortem suam exheredatus est; quare et contra tabulas paternorum libertorum hujusmodi filius honorum possessionem accipere poterit." l. 13. 2. Dig. de lib. et post. her. (28. 2.)

Again, a testament was said to be *ruptum*, which, although valid when made, subsequently lost its validity, as if a child were not properly disinherited, or if there were the agnation of a *suus heres*. Papinianus in a single definition includes all the above cases. "Testamentum," says he, "aut non jure (*injustum*) factum dicitur, ubi solemnia juris defuerunt aut nullius esse momenti, quum filius, qui fuit in patris potestate, præteritus est, aut rumpitur alio testamento, ex quo heres existere poterit, vel agnatione sui heredis, aut in irritum constituitur non adita hereditate." l. 1. Dig. de injusto. rup. (28. 3).

A testament was said to be *irritum* when rendered useless by the testator undergoing a change of status, or if no one entered the inheritance under it. The estate in this last case was said to be *destitutum*: but the general expression *irritum* was also applied, as well as the more exact and particular term *destitutum*, to a testament that from some cause or other had been abandoned. A *testamentum inofficiosum* was one made in a legal form, "*sed non ex officio pietatis*;" as when the testator had disinherited his own children or passed over his parents, brothers or sisters. Plin. Epis. v. 1. Dig. de inoffic. test. (5. 2.)

142. Simile jus olim fuit in ejus persona cujus nomine ex senatusconsulto erroris causa probatur, quia forte ex peregrina vel Latina, quæ per errorem quasi civis Romana uxor ducta esset, natus esset. Nam sive heres institutus esset a parente sive exheredatus, sive vivo patre causa probata sive post mortem ejus, om-

112. The law was formerly the same relating to that person in regard to whom ground of error was proved in accordance with the senatusconsultum, because perchance he had been born of a Peregrina or Latina, whom his father had married in mistake for a Roman citizen. For whether this child had been instituted

nimodo quasi agnatione rumpebat testamentum. (y)

heir by his agnate ascendant, or disinherited, or cause had been shown during the life-time of the father or after his death, the testament was in every case broken by this quasi agnation.

(y) See note on "Causæ probatio," i. 39.

143. Nunc vero ex novo senatus-consulto quod auctore divo Hadriano factum est, (z) si quidem vivo patre causa probatur, æque ut olim omnimodo rumpit testamentum: si vero post mortem patris, *preteritus* quidem rumpit testamentum, si vero heres in eo scriptus est vel exheredatus, non rumpit testamentum; ne scilicet diligenter facta testamenta rescinderentur *eo tempore quo renovari non possent*.

143. But now, by virtue of a new senatus-consultum, made under the authority of the Emperor Hadrian, if cause is shown during the life of the father, the testament is also in like manner made invalid as formerly; if, on the other hand, the error is proved after the death of the father, the testament is rendered invalid only in the case of the child being passed over, but if the heir is instituted or disinherited, the testament is not broken; for a testament made with such care cannot be rescinded at a time when it is impossible to be re-executed.

(z) A number of senatus-consulta were enacted in the reign of the Emperor Hadrian, though none appear to have borne his name. Thus, we find several "senatus-consulta auctore Hadriano facta" referred to by Gaius, as in i. 47, and also in the present passage. It appears that a testament was rendered invalid when subsequently a "posthumus suus" arose, through what was technically termed "agnatio posthumi," i. e., a child born after the father had made his testament. The testament was said to be *rumpit*. See note on ii. secs. 134. 141. Persons who might possibly be entitled could only be dealt with by institution as heirs, or by disinherison, but even this did not always suffice, for children adopted after the testament had been made, or a woman *in manus* or sons "ex prima secundaque mancipatione manumissi," could not be disinherited, since they were "extranei." Nor did institution remedy the difficulty because they could not be

instituted as *sui*. Gai. ii. 138—142. Subsequently, in the case of institution an exception was made. In like manner institution and disinherison were without advantage in the case of the “*causæ probatio erroris causa*.” See book i. sec. 32. By the *senatus-consultum* passed in the reign of Hadrian and referred to in the text, an exception was made, and the testament was not broken—“*si vero hæres in eo scriptus est vel exheredatus*,” even though the birth occurred after the death of the testator. See Puchta’s *Instit.* iii. p. 249.

144. *Posteriore quoque testamento quod jure factum fuerit superius rumpitur. Nec interest an extiterit aliquis ex eo heres, an non extiterit: hoc enim solum spectatur, an existere potuerit. Ideoque si quis ex posteriore testamento quod jure factum est, aut noluerit heres esse, aut vivo testatore, aut post mortem ejus antequam hereditatem adiret decesserit, aut per cretionem exclusus fuerit, aut conditione sub qua heres institutus est defectus sit, aut propter cælibatum ex lege Julia summotus fuerit ab hereditate: quibus casibus paterfamilias intestatus moritur: nam et prius testamentum non valet, ruptum a posteriore, et posterius æque nullas vires habet, cum ex eo nemo heres extiterit. (a)*

144. An earlier testament is revoked also by one of later date legally made. Nor does it signify whether under the new testament any one has become heir or not; for this only is regarded, whether there could have been an heir under it, or not. Therefore, if he who is instituted heir by the last testament legally made, does not wish to be heir—or if he dies before the testator—or after his decease, but before he has entered upon the *hereditas*—or if he be excluded by the *cretio*—or if his interest terminate by the failure of the condition under which he was instituted—or if on account of cælibacy and in accordance with the *lex Julia* he has been set aside from the *hereditas*—in any of these cases the testator dies intestate: for the first testament is invalid, being revoked by the second, and the second is equally of no effect, as no one is heir under it.

(a) See note on “*Cretio*,” ii. s. 164.

145. *Alio quoque modo testamenta jure facta infirmantur, velut cum is qui fecerit testamentum capite diminutus sit. Quod quibus modis accidat, primo commentario relatum est.*

145. Testaments legally made are invalidated in another way, for example, if the testator suffer a *capitis deminutio*. We have shewn in the first Commentary under what circumstances this may happen.

146. Hoc autem casu *inrita* fieri testamenta dicemus, cum alioquin et quæ rumpuntur *inrita* fiant; et quæ statim ab initio non jure fiunt *inrita* sunt; sed et ea quæ jure facta sunt et postea propter capitis diminutionem *inrita* fiunt, possunt nihilominus rupta dici. Sed quia sane commodius erat singulas causas singulis appellationibus distingui, ideo quædam non jure fieri dicuntur, quædam jure facta rumpi, vel *inrita* fieri.

JUST. II. 17. 5.

147. Non tamen per omnia inutilia sunt ea testamenta, quæ vel ab initio non jure facta sunt, vel jure facta postea *inrita* facta aut rupta sunt. Nam si septem testium signis signata sint testamenta, potest scriptus heres secundum tabulas bonorum possessionem petere, si modo defunctus testator et civis Romanus et suæ potestatis mortis tempore fuerit: nam si ideo *inritum* fit testamentum, quod postea civitatem vel etiam libertatem testator amisit, aut is (b) in adoptionem se dedit et mortis tempore in adoptivi patris potestate fuit, non potest scriptus heres secundum tabulas bonorum possessionem petere.

JUST. II. 17. 6.

146. But in this case we say the testaments become inoperative, since moreover both those which are broken and those which from the beginning, were not legally made, may be equally well termed inoperative (*inrita*). We may also term those testaments broken, which, although at first legally made, become subsequently through *capitis deminutio* inoperative. But as it is more convenient to distinguish by different terms each case, some are said to be "illegally made" (*non jure facta*), others which have been legally made, to be "broken" (*rumpi*), or rendered "inoperative," (*inrita fieri*).

147. Yet those testaments, which either at the first were not legally made, or having been legally made, were afterwards rendered inoperative or broken, are not in all respects useless. For if they have been attested by the seals of seven witnesses, the appointed heir can claim possession of the property in accordance with the words of the testament (*secundum tabulas*), provided only the deceased testator had been at the time of his death, both a Roman citizen and *sui juris*. If however a testament becomes inoperative because after making it the testator has lost his citizenship or even his liberty—or has given himself in adoption, and was at the time of his death under the *potestas* of his adoptive father—the appointed heir cannot demand the possession of the property *secundum tabulas*.

(b) Instead of *aut is*, Huschke proposes to substitute "utique," which particle he says is to be taken in the sense of *tantum*. Goeschen approves of this, and says "quod placeret, utique si Gaius vocabulo *utique* pro *tantum* uteretur." Boecking's Gai. p. 118.; Kritik p. 43.; Huschke's Gai. p. 167.

148. *Qui autem secundum tabulas testamenti, quæ aut statim ab initio non jure factæ sint, aut jure factæ postea ruptæ vel irritæ erunt, bonorum possessionem accipiunt, si modo possunt hereditatem obtinere, habebunt bonorum possessionem cum re: si vero ab iis avocari hereditas potest, habebunt bonorum possessionem sine re.* (c)

148. But they who receive *secundum tabulas* the *bonorum possessio* of a testament which was either from the very beginning illegal, or which though legally made was subsequently broken, or rendered inoperative, if only they can obtain the *hereditas*, will have the *bonorum possessio* with a beneficial interest (*cum re*), but if the *hereditas* can be reclaimed they will have the *bonorum possessio* without a beneficial interest (*sine re*.)

(c) For the distinction between the “bonorum possessio cum re” and that “sine re,” see the note to section 119 of this book.

149. *Nam si quis heres jure civili institutus sit vel ex primo vel ex posteriore testamento, vel ab intestato jure legitimo heres sit, is potest ab iis hereditatem avocare. Si vero nemo sit alius jure civili heres, ipsi retinere hereditatem possunt, si possident, aut interdictum adversus eos habent qui bona possident eorum bonorum adipiscendæ possessionis causa. Interdum tamen, quanquam testamento jure civili institutus, vel legitimus quoque heres sit, potiores scripti habentur, velut si testamentum ideo non jure factum sit aut quod familia non venierit, aut nuncupationis verba testator locutus non sit.*

149. For if a person has been instituted heir according to the civil law, either in the first testament, or in a subsequent one, or if he be heir to an intestate (*ab intestato*) by mere process of law, he can reclaim the inheritance from those who possess it. But if there be no other heir according to the *jus civile*, they can retain the inheritance if they are in possession, or if they have an interdict against those who possess the property, in a cause instituted in order to obtain the possession. Yet sometimes although an heir is instituted in the testament, in accordance with the *jus civile*, or one is instituted by operation of law, those appointed (*scripti*) have the preference; for example, if the testament has not been made according to the civil law, either because the *familia* has not been sold, or the testator has not pronounced words of *nuncupatio*.

150. *Alia causa est eorum, qui herede non extante bona possiderint,*

150. It is different with those, who have gained possession of the pro-

nec tamen a Prætoris bonorum possessionem acceperint: etiam hi possessores tamen res olim obtinebant ante legem Juliam, (d) qua lege bona caduca fiunt et ad populum deferri jubentur, si defuncto nemo successor extiterit.

perty when there is no heir, and yet have not received the *possessio bonorum* from the prætor. Also such possessors used formerly to obtain the property before the *lex Julia*, by which law the property now becomes *caduca*, and is adjudged to be transferred to the people, if no successor to the deceased has appeared.

(d) The law referred to here is the same law which is elsewhere designated as the “*lex Julia et Papia Poppæa*.” The term “*caducum*” was generally applied to anything without an owner, as to the mast which fell from a tree. Gaius says, “*Glans caduca est, quæ ex arbore cecidit.*” 1. 30. sec. 4. de verb. sig. (59. 60.) In the law of inheritance it was a term employed to denote a thing which, from some cause or the other, could not be inherited and enjoyed by the person for whom it was intended by the testator. For example, if the person whom it was designed to benefit were unmarried, and if he did not marry within the hundred days prescribed by law—or if he were childless—or if he died before the opening of the testament, or before the entrance of the heir—or if he refused to receive the legacy left him—or if something had been left to a person under a condition, and the condition failed: in all these cases, the thing devised became *caducum*. The property which failed to come to a person in consequence of something happening during the lifetime of the testator, was said to be *in causa caduci*; that which failed to take effect between the death of the testator and the opening of his will, was called simply *caducum*. Ulpianus says, “*Et si nemo sit, ad quem bonorum possessio pertinere possit, aut sit quidem, sed jus suum omiserit, populo bona deferuntur ex lege Julia caducaria.*” Tit. xxviii. 7. Thus, in the most extensive signification of the term, we are to understand by *caduca*, all the property of the inheritance, both the portions of the heirs and the legacies; and according to the *lex Julia*, those also which from causes independent of the will of the testator, had not, or could not be

acquired. (*Cadit ab eo.*) In a more limited sense, the term “caducum” was applied to that devised property which a person, from some cause or the other, was unable to possess, which cause must have arisen after the death of the testator, and before the opening of his will. The strictness by which *caduca* were regulated came in the course of time to be relaxed. In the reign of the emperor Trajan, an enactment was made, by which if a person disqualified from taking under a testament should himself give notice to the *Ærarium*, he became entitled to receive one half of the reward given to an informer. In the time of Constantine a still further relaxation of the law took place, by which the *cælebs* and the *orbis* were no longer disqualified on the ground of non-marriage or childlessness. Finally, Justinian abolished all the restrictions of *caduca*, and re-established on its former foundation the “*jus antiquum in caducis.*” See Marezoll. *Instit.* p. 550. et seq. “*Bona caduca*” in *Dict. Gr. et Rom. Antiq.* Art “*Caducus*” in *Hermann’s Handlexicon*, p. 55.; *Gai.* ii. 206, 207.; *Ulp. Frag.* xvii. 1.; xix. 17.; xxiv. 12.; *Vat. Frag.* sec. 195. l. unica *Cod.* (6. 51.)

151. Potest, ut jure facta testamenta infirmetur appareat posse testator ejus jure civili valeat qui tabulas testamenti [2 lin. des.] quidem si quis ab intestato bonorum possessionem petierit [3 lin. des.] perveniat hereditas. Et hoc ita rescripto Imperatoris Antonini significantur.

151. But because it can happen that testaments legally made may be invalidated, it appears that the testator can is valid by the *jus civile* if any seek the *possessio bonorum ab intestato* . . . let him acquire the *hereditas*. This is so determined by a rescript of the Emperor Antoninus.

152. Heredes autem aut necessarii dicuntur aut sui et necessarii aut extranei. (e)

152. Heirs are said to be *necessarii*, or *sui et necessarii*, or *extranei*.

JUST. ii. 19. pr.

(e) There were four classes of heredes, not three only, as here mentioned — *sui*, *necessarii*, *sui et necessarii*, and *extranei*. The term *sui* was applied to those descend-

ants who were subjected immediately to the *patria potestas*. They were the heirs belonging to the *familia*, using the term in its limited sense. Thus, Paulus in his own terse style says, "*Proximiores ex agnatis sui dicuntur.*" l. 10. s. 3. Dig. de grad. et affin. (38. 10.) The *heredes sui et necessarii* were sons and daughters, and the sons and daughters of a son, who were subjected to the *patria potestas* of a testator. They were thus named because they were bound by the *jus civile* to take the *hereditas* with all its incumbrances. This must at times have been a great hardship; hence, the *prætor* allowed such to disclaim the *hereditas*, (*abstinere se hereditate*) and ordered the estate to be sold to pay the testator's debts. Cic. Phil. ii. 16. The *heredes necessarii* were those heirs who by the *jus civile* were compelled *nolens volens* to take the inheritance. They had no power to disclaim, and hence the name *necessarii*. They were slaves of the testator who were made heirs and set free the same time. See Gai. ii. 154. The slave instituted as heir had no will of his own in the matter. When once appointed, if he were declared free he became *ipso jure* the heir of the defunctus. There was no need of his expressing his willingness to undertake the inheritance. Thus, Justinian says in the Institutes, "*Necessarius heres est servus heres institutus, ideo sic appellatus, quia sive vellit, sive nolit omnino post mortem testatoris protinus liber et necessarius heres fit.*" Inst. s. 1. de hered. qual. et dif. (2. 19.) The *extranei* heredes were all those not included under the categories *sui* and *necessarii*, that is to say, those not subjected to the *patria potestas* of the testator; and in this respect they were the very opposite of the *sui* heredes. Justinian says in the Institutes "*Ceteri qui testatoris juri subjecti non sunt, extranei heredes appellantur;*" and then as examples there are given "*liberi quoque nostri qui in potestate non sunt; . . . heredes a matre instituuntur, eodem numero sunt; servus quoque heres a domino institutus et post ab eo manu-missus.*" Ins. s. 3. tit. cit. (2. 19.) A limited time was allowed for certain heirs to enter upon the *hereditas* or to

disclaim. See note, on "Cretio," book ii. s. 164. Cic. de Orat. i. 22. and the note "Extraneus," s. 162.

153. *Necessarius heres est servus cum libertate heres institutus; ideo sic appellatus, quia, sive velit sive nolit, omnimodo post mortem testatoris protinus liber et heres est.*

153. A necessary heir is a slave who is instituted heir, with the gift of freedom; he receives this appellation because, whether he be willing or unwilling, he is in every case after the death of the testator at once both a free man and an heir.

JUST. II. 19. 1.

154. *Unde qui facultates suas suspectas habet, solet servum primo aut secundo vel etiam ulteriore gradu liberum et heredem instituere, ut si creditoribus satis non fiat, potius hujus heredis quam ipsius testatoris bona veneant, id est ut ignominia quæ accidit ex venditione bonorum hunc potius heredem quam ipsum testatorem contingat; quamquam apud Fufidium (f) Sabino placeat eximendum eum esse ignominia, quia non suo vitio, sed necessitate juris bonorum venditionem pateretur: sed alio jure utimur.*

154. Hence, he who suspects that he is insolvent, generally institutes his slave as his heir in the first, second, or even in some more remote place: so that, if there should not be sufficient to pay his debts, the property sold may seem rather that of the heir, than of the testator himself; that is to say, in order that the disgrace which results from the sale may fall on the heir, rather than upon the testator; although Sabinus, in his commentary on Fufidius, declares that the slave is exempted from that infamy, since he suffers the sale of the property by necessity of law, and not by his own fault: but we observe a different rule of law.

(f) Fufidius was a jurist who lived in the time of Proculus. Africanus, in his book ii. *Quæstionum*, has an answer addressed "apud Fufidium," or, as the Florentine code has it, "Phuphidium." l. 5. *Dig. de auro*, etc. (34. 2.) Gaius also refers to Fufidius, to differ from him upon a matter relating to manumission by a pupil for the purpose of having a tutor. l. 25. *Dig. de manumiss.* (40. 3.) As we learn from the text, Fufidius was a Sabinian. This is worthy of note, as it shows the independence of Gaius, who belonged himself to the school of Sabinus—the school which followed the strict letter of the law.

155. Pro hoc tamen incommodo illud ei commodum præstatur, ut ea quæ post mortem patroni sibi adquisierit, sive ante bonorum venditionem sive postea, ipsi reserventur. Et quamvis *pro portione* bona venierint, iterum ex hereditaria causa bona ejus non venient, nisi si quid ei ex hereditaria causa fuerit acquisitum, velut si Latinus adquisierit, locupletior factus sit; cum ceterorum hominum quorum bona venierint pro portione, si quid postea adquirant, etiam sæpius eorum bona veniri solent.

JUST. II. 19. 1.

156. Sui autem et necessarii heredes sunt velut filius filiave, nepos neptisve ex filio, deinceps ceteri, qui modo in potestate morientis fuerunt. Sed uti nepos neptisve suus heres sit, non sufficit eum in potestate avi mortis tempore fuisse, sed opus est, ut pater quoque ejus vivo patre suo desiderit suus heres esse, aut morte interceptus aut qualibet ratione liberatus potestate: tum enim nepos neptisve in locum sui patris succedunt.

JUST. II. 19. 2.

157. Sed sui quidem heredes ideo appellantur, quia domestici heredes sunt, et vivo quoque parente quodam modo domini existimantur. Unde

155. Nevertheless, to compensate for this inconvenience, a slave enjoys this advantage, that those things which he has acquired after the death of his patron, whether before or after the sale of the property, are reserved to himself; and although there has been a sale of the property for the payment of part of the debts, there shall be no second sale of property on account of the inheritance, unless he has acquired anything in consequence of the inheritance, e.g. if he has become richer by the acquisitions he has made, being a Latinus; whilst as to all other persons whose property has been sold for paying a dividend, if they acquire anything afterwards, their entire property is liable to be repeatedly sold.

156. Now some heirs are also "*sui et necessarii*," such, for instance, as a son, a daughter, a grandson, or grand-daughter by a son, or other direct descendants, if only they were under the *potestas* of the deceased at the time of his death. But in order that grandsons or grand-daughters may be *sui heredes*, it is not sufficient for them to have been under the *potestas* of their grandfather at the moment of his death; but it is essential also that their father should have ceased to be a *suus heres* in the lifetime of his father, having been cut off by death or through some other cause freed from the *potestas*, for then the grandson or grand-daughter succeeds to the place of the father.

157. But they receive the designation of *sui heredes* because they are heirs belonging to the family (*domestici heredes*) and, during the

etiam si quis intestatus mortuus sit, prima causa est in successione liberorum. Necessarii vero ideo dicuntur quia omnimodo, *sive velint sive no- lint, tam* ab intestato quam ex testamento heredes fiunt.

lifetime of the agnate descendant they are regarded in a certain measure as proprietors. Wherefore, if any one die intestate, the succession in the first place devolves on his children. They are also called necessarii, for the reason that, in every case, whether they assent or not, they become heirs, either by intestacy or in virtue of a testament.

158. Sed his Prætor permittit abstinere se ab hereditate ut potius parentis bona veneant. (g)

158. But the prætor permits them to decline the inheritance, that the property may be sold rather as belonging to the parent than to them.

JUST. II. 19. 2.

(g) The property was disposed of under the name of the deceased, in order that the ignominy of the sale might not fall on the heir.

159. Idem juris est et in uxoris persona quæ in manu est, quia filiæ loco est, et in nurus quæ in manu filii est, quia neptis loco est. (h)

159. The same rule of law is established in respect to the wife in *manus*, because she is in the place of a daughter; and with respect to the daughter-in-law, who is in the *manus* of the son, because she is in the place of a grand-daughter.

(h) The wife who was in the *manus* of her husband, and the daughter-in-law who was in the *manus* of the son (*in manu filii*) were at liberty to abstain from the inheritance. See sec. 158. This right differed from the benefit to be derived from a separation of property in this respect. It sufficed for the "heredes sui et necessarii;" for the wife in *manus*, and for those who were in *mancipium*, not to intermeddle with the property belonging to the succession, in order to their avoiding personal liability. Whereas a "heres necessarius" who had asked for and obtained the separation of his own property from that in course of descent must enter upon the hereditas. It may be also observed that the "heredes sui et necessarii" could not be made personally

liable, and that the property of the succession was sold in the name of the defunctus, whilst the “heredes necessarii” were sued personally, but only in concurrence with the hereditary property. See Domenget in loco.

160. Quin etiam similiter abstinendi potestatem facit prætor etiam mancipato (id est) ei qui in causa mancipi est, cum liber et heres institutus sit; cum necessariis, non etiam suus heres sit, tamquam servus.

160. Moreover, the prætor equally accords the right of abstaining to him who is mancipated, that is to say, subjected to the *mancipium*, when that he is declared free and instituted heir; since he like a slave is a *heres necessarius*, and not also a *suus heres*.

161. Ceteri qui testatoris juri subiecti non sunt extranei heredes appellantur. Itaque liberi quoque nostri qui in potestate nostra non sunt, heredes a nobis instituti sicut extranei videntur. Qua de causa et qui a matre heredes instituuntur eodem numero sunt, quia feminæ liberos in potestate non habent. Servi quoque qui cum libertate (i) heredes instituti sunt et postea a domino manumissi, eodem numero habentur.

161. Those who are not subjected to the power (*juri*) of the testator, are called *heredes extranei*. Therefore also our children who are not under our potestas when they are instituted heirs by us, are regarded as extranei. For which reason those also who are instituted heirs by their mother are reckoned in the same class, because women have not their children under their potestas. Slaves also who have been instituted heirs and declared free, but who have afterwards been manumitted by the testator, are reckoned in like manner *extranei*.

JUST. II. 19. 3.

(i) The MS. reads “qui cum liberiet,” which Huschke says is manifestly a mistake in writing for “qui cum libertat. (libertate).” Gneist has admitted this emendation into his text. Gaius expresses himself similarly in ii. 187, 188. If this emendation is not accepted, Huschke says we must read “liberi et heredes esse jussi.” Sec. ii. 186. Lachmann also agrees with this proposal. Huschke’s Kritik, 47. The better reading would be “liberi et heredes instituti sunt.”

162. Extranei (j) autem heredibus deliberandi potestas data est de adeunda hereditate vel non adeunda.

162. Power is given to the *extranei heredes* to deliberate as to whether they will enter upon the *hereditas* or not enter.

JUST. II. 19. 5.

(j) The term “extraneus” in its most extensive signification is applied to any one standing without the circle of a certain specified relationship. In its more limited meaning it is applied to those who do not belong to the family, or are under no bond arising from the marital relation. For example, “post emancipationem (a patre adoptivo factam) extraneus intelligor.” l. 55. sec. 1. Dig. de ritu nup. (23. 2.) It is used in opposition to the term patria-potestas; “si extraneo quis adscripserit legatum, licet postea vivo testatore in potestate eum, etc.” l. 10. sec. 1. Dig. de leg. Cor. 48. 10.) It is also used in contradistinction to the pater or parens: “si patronus vel quivis extraneus impuberi tutorem dederit.” l. 31. pr. Cod. de jure dot. (5. 12.) l. 19. Cod. de jure delib. (6. 30.) Again, we have the following definition: “Extraneum, intelligimus omnem citra parentem per virilem sexum adscendentem, et in potestate dotatam personam habentem.” l. unica. sec. 13. Cod. de rei uxor. actio. (5. 13.) For further illustrations of the word, see Hermann’s Handlexicon sub voce “Extraneus.”

163. Sed sive is cui abstinendi potestas est immiscuerit se bonis hereditariis, sive is cui de adeunda hereditate deliberare licet, adierit, postea relinquendae hereditatis facultatem non habet, nisi si minor sit annorum xxv. Nam hujus aetatis hominibus, sicut in ceteris omnibus causis, deceptis, ita etiam si temere damnosam hereditatem susceperint, praetor succurrit. Scio quidem divum Hadrianum etiam majori xxv annorum veniam dedisse, cum post aditam

163. But if one who has power to decline accepting the inheritance has intermeddled with the property or if he, who is permitted to deliberate as to the acceptance of the inheritance, enters upon it, he has not afterwards the power of renouncing the inheritance, unless he be under twenty five years of age. For just as in all other cases the praetor relieves men of this age who have been deceived, so also does he if they have without due consideration accepted

hereditatem grande æs alienum quod aditæ hereditatis tempore latebat apparuisset.

a burdensome inheritance. I am not ignorant that the Emperor Hadrian however, has granted this indulgence to one more than twenty-five years of age, i. e., full age, when after having entered on the inheritance, he has discovered a great debt, which was concealed from him at the time of entrance upon the inheritance.

JUST. II. 19. 5.

164. Extraneis heredibus solet *cretio* (*k*) dari, id est finis deliberandi, ut intra certum tempus vel adeant hereditatem, vel si non adeant, temporis fine summoveantur. Ideo autem *cretio* appellata est, quia cernere est quasi decernere et constituere.

164. *Cretio* is usually granted to *extranei heredes*, that is to say, a limit is assigned for deliberation, so that within a certain time they may either enter upon the inheritance, or if they do not enter, they may be set aside at the expiration of this time. This is called *cretio*, from *cernere*, because this word denotes as it were to deliberate (*decernere*), and settle (*constituere*).

(*k*) The term *cretio* was employed to denote the right of an extraneus to declare by word of mouth whether he would enter upon an inheritance or not (*cernere hereditatem*), and also the entrance upon the hereditas itself with the usual formalities after the time prescribed by the testator. "Extraneus autem heredibus deliberandi potest data est de adeunda hereditate vel non adeunda." Gai. ii. sec. 162. The word is technical as used in the old Roman law. Ulpianus says, "*Cretio est certorum dierum spatium quod datur instituto heredi ad deliberandum, utrum expediat ei adire hereditatem, necne, velut: Titius heres meus esto cernitoque in diebus C. proximis, quibus scieris poterisque; nisi ita creveris, exheres esto. Cernere est verba cretionis dicere ad hunc modum: quod me Mævius heredem instituit, eam hereditatem adeo cernoque.*" Tit. xxii. ss. 27, 28. See also ss. 29—34. The *cretio* might begin to run from the time when it became possible for the person

appointed heir to make it, and in this case it was called the “cretio vulgaris,” as in the definition from Ulpianus just cited, “quibus scieris poterisque.” If, however, these words were omitted, the cretio was said to be “continua” or “certorum dierum” reckoning onward from the death of the testator, entirely ignoring the possibility of the entrance of the person appointed as heir. If the cretio were made within the appointed time, then the right of inheritance was acquired by the heir; but if it were not made, it was lost simply by the lapse of the time fixed and without any repudiation (*omittere hereditatem*.) This, however, took place when the words “Quodni ita creveris exheres esto” were introduced. Such a form was called “cretio perfecta.” If there were no words of disinheritance the cretio was said to be “imperfecta,” and lost its operation. One other case was also possible; the form of words might be “si non creveris, Mævius heres esto.” In this case the cretio had the effect, that if the heir did not declare himself as such, the substituted heir took the inheritance. The latter was not required to make a formal *cretio*, but could declare his intention to inherit in any way he pleased. A constitution of Honorius and, Arcadius, A.D. 407, abolished the “cretionum scrupulosa sollemnitās.” The testator could, however, still set a term within which the heir might declare himself willing to enter upon the inheritance, but this could be done without any formality. l. 17. Cod. de jure delib. (6. 36.); Puchta’s *Instit.* vol. iii. pp. 257, 258.; Walter’s *Rechtsgeschich.* vol. ii. sec. 628.; Hermann’s *Handlexicon* Art. “cernere.” Gai. ii. 164—173. l. 5. Cod. Theod. (8. 18.)

165. Cum ergo ita scriptum sit:
HERES TITUS ESTO: adicere debe-
mus; CERNITOQUE IN CENTUM DIEBUS
PROXIMIS QUIBUS SCIES POTERISQUE.
QUOD NI ITA CREVERIS, EXHERES ESTO.

165. When therefore it is thus
written “Thou, Titius, shalt be heir,”
we ought to add, “and thou shalt
accept within the next hundred days,
after thou hast knowledge of the ap-
pointment, and art able; if thou dost
not thus enter on the inheritance,
thou shalt be disinherited.”

166. Et qui ita heres institutus est si velit heres esse, debet intra diem *cretionis* cernere, id est hæc verba dicere: QUOD ME PUBLIUS MÆVIUS TESTAMENTO SUO HEREDEM INSTITUIT, EAM HEREDITATEM ADEO CERNOQUE. Quod si ita non creverit, finito tempore *cretionis* excluditur; nec quicquam proficit, si pro herede gerat, id est, si rebus hereditariis tamquam heres utatur.

167. At is qui sine *cretione* heres institutus sit, aut qui ab intestato legitimo jure ad hereditatem vocatur, potest aut cernendo aut pro herede gerendo vel etiam nuda voluntate suscipiendæ hereditatis heres fieri: eique liberum est, quocumque tempore voluerit, adire hereditatem. *Sed* solet prætor postulanti- bus hereditariis creditoribus tempus constituere, intra quod si velit adeat hereditatem: si minus, ut liceat creditoribus bona defuncti vendere.

168. Sicut autem cum *cretione* heres institutus, nisi creverit hereditatem, non fit heres, ita non aliter excluditur, quam si non creverit intra id tempus quo *cretio* finita sit. Itaque licet ante diem *cretionis* constituerit hereditatem non adire, tamen pænitentia actus superante die *cretionis* cernendo heres esse potest.

166. And he who is thus instituted heir, if he wishes to be heir, ought to decide within the period allowed for *cretio*; that is, he must pronounce the following words: "Because Publius Mævius has instituted me his heir by testament, I enter upon, and decide to accept that inheritance." If he has not thus decided, when the period for *cretio* has elapsed he is excluded. Nor is it of any advantage to him if he acts as heir, that is to say, if he uses the goods of the inheritance as if he were heir.

167. But he who is instituted heir without *cretio*, or who is called to the inheritance by intestacy (*ab intestato*), in strict accordance with law, can become heir, either by declaration of his acceptance, or by acting as the heir, or even by the mere wish to undertake the duties appertaining to the inheritance; and he is at liberty to enter upon the *hereditas* whenever he may wish. But the prætor usually, on the petition of the creditors of the estate, appoints a time within which, if the heir desires to accept he must enter upon the inheritance; and if he do not enter within this time, the creditors are allowed to sell the property of the deceased.

168. Just as if any one is instituted heir with the *cretio*, he does not become heir except he has declared his acceptance of the inheritance; so also he is excluded in no other way, than by his non-declaration of acceptance within the period limited for the *cretio*. Therefore though before the determination of the *cretio*, he may have resolved not to enter upon the inheritance, yet upon regretting this decision, he may become heir by declaring his acceptance on the day before the expiration of the *cretio*.

169. At hic qui sine cretione heres institutus est, quique ab intestato per legem vocatur, sicut voluntate nuda heres fit, ita et contraria destinatione statim ab hereditate repellitur.

169. But as he who is instituted heir without *cretio*, or who is called by law in consequence of intestacy, becomes heir by a mere act of will, so he is immediately excluded from the intestacy by a contrary determination. (l)

(l) Those who were instituted without *cretio* (*sine cretione*) could give up the inheritance, and there was not in their case the possibility of reclaiming it upon their repudiation, as when the heir had been instituted with the *cretio*. An extraneous, instituted heir *ex testamento*, or called by law to the succession *ab intestato*, might become heir either by doing some act as heir, or even by expressing his wish to accept the inheritance. Domenget in loco. Ins. s. 7. de her. qual. et dif. (2. 19.)

170. Omnis autem *cretio* certo tempore constringitur. In quam rem tolerabile tempus visum est centum dierum: potest tamen nihilominus jure civili aut longius aut brevius tempus dari: longius tamen interdum prætor coartat.

170. But every *cretio* is limited to a fixed time; for which object a period of a hundred days seemed a reasonable time; still, by the *jus civile* a longer or shorter period may be given; yet the prætor sometimes abridges any longer period.

171. Et quamvis omnis *cretio* certis diebus constringatur, tamen alia *cretio* vulgaris vocatur, alia certorum dierum: vulgaris illa, quam supra exposuimus, id est in qua adiciuntur (m) hæc verba: QUIBUS SCIET POTERITQUE; certorum dierum, in qua detractis his verbis cetera scribuntur.

171. And although every *cretio* is limited by a certain number of days, yet one kind of *cretio* is called "common" (*vulgaris*), another "determinate" (*certorum dierum*). The *cretio* vulgaris "common," as we have already explained above, is that in which these words are employed, QUIBUS SCIET POTERITQUE, i.e. within which he may become aware of the bequest, and be able to act. "Determinate," that in which the formula is used without these words.

(m) The word *adiciuntur* is an emendation from Huschke. The MS. has *dicuntur*, which was followed in all the early

editions. Huschke says that *dicuntur* cannot be the correct reading, since the words "Quibus sciet poterit" were not spoken, but written. By repeating the "a" of the previous word, the present reading has been obtained. The emendation also agrees with Ulpianus, who says, "Cretio aut vulgaris dicitur aut continua: vulgaris, in qua adiciuntur hæc verba: 'Quibus scieris poterisque;' continua in qua non adiciuntur." Tit. xxii. s. 31. Huschke's Kritik, p. 47. Boecking's Gai. p. 127.

172. Quarum cretionum magna differentia est. Nam vulgari cretione data nulli dies computantur, nisi quibus scierit quisque se heredem esse institutum et possit cernere. Certorum vero dierum cretione data etiam nescienti se heredem institutum esse numerantur dies continui; item ei quoque qui aliqua ex causa cernere prohibetur, et eo amplius ei qui sub condicione heres institutus est, tempus numeratur. Unde melius et aptius est vulgari cretione uti.

173. Continua hæc cretio vocatur, quia continui dies numerantur. Sed quia tamen dura est hæc cretio, altera in usu habetur: unde etiam vulgaris dicta est.

DE SUBSTITUTIONIBUS. (n)

174. Interdum duos pluresve gradus heredum facimus, hoc modo: LUCIUS TITIUS HERES ESTO CERNITOQUE IN DIEBUS CENTUM PROXIMIS QUIBUS SCIES POTERISQUE. QUOD NI ITA

172. There is a great difference between the two kinds of *cretio*. For in the "common" *cretio*, no days are counted, except those in which the person instituted has knowledge of the fact, and can decide to accept; in "determinate" *cretio* on the other hand, the days are counted continuously, even when the party has no knowledge that he has been instituted heir. Again, the time is reckoned against him who is on any ground prevented from deciding, and more especially against him who has been instituted heir under a condition. Therefore it is better, and more convenient to employ the common *cretio* (*vulgaris cretio*).

173. This kind of *cretio* (*certorum dierum cretio*) is called "continuous," because the days are counted without any intermission, but since this species is somewhat inequitable, the other is more in use: whence it is named "common."

ON SUBSTITUTION.

174. Sometimes we institute two or more grades of heirs, in the following manner—"You, Lucius Titius, shall be heir, and you shall accept within the next hundred days after

CREVERIS, EXHERES ESTO. TUM MÆVIUS HERES ESTO CERNITOQUE IN DIERUS CENTUM et reliqua; et deinceps in quantum velimus substituere possumus.

you have knowledge of your appointment, and are able to act, if you do not decide to accept, you shall be disinherited. Then Mævius shall be heir, and decide to accept within a hundred days," etc.; and we can further make as many substitutions as we please.

(n) In this section Gaius directs the attention of the student to the doctrine of Substitution. By this term is to be understood the institution of a second heir, or to speak more exactly the institution of a possible heir or of heirs. Thus, Gaius in his illustration says, "Lucius Titius heres esto, etc. Quod ni, etc., tum Mævius heres esto." In the earlier period of Roman law this was the only kind of substitution and it was called "*vulgaris substitutio*." It was not confined to one substitute, but several (*plures*) might be appointed, so that if one disclaimed another might succeed to his place. The testator could thus appoint—"A heres esto (*institutus*); si A heres non erit, B heres esto (*substitutus*); si B heres non erit, C heres esto (*substitutus substituti*); C is heir in the third degree. In this way there might be a succession of persons substituted to succeed the one after the other, in case of the failure of any one of them arising from any cause whatever.

In the time of the Republic "*vulgaris substitutio*" was quite frequent; and it is often referred to by Cicero. But it was not till the time of Augustus, nor till after the passing of the *lex Julia et Papia Poppeæ*, that vulgar substitution came to be constantly employed. The universal desire with the Roman, it must be remembered, was to die testate. The operation, however, of the *lex* just cited must have been the cause of many persons dying intestate, from the numerous grounds of incapacity to which the law gave rise. In the time of the Republic, and as already mentioned in the age in which Cicero lived, there was a limited "*vulgaris substitutio*," which enabled a man who had instituted an *impubes* son as his heir, to appoint with him one or more substitutes.

So that if his *impubes* son did not enter upon the estate, or, if surviving the testator, he died before he was old enough to enter upon it, the *heres secundus* obtained the inheritance. The words of the will would run in this form : "Titius heres meus esto : si Titius heres non erit, Sempronius secundus heres esto." If Titius died before the father or whilst under the tutela, then Sempronius succeeded as *heres secundus*. So that the institution of the *heres secundus* was dependent upon two conditions—the child dying before the father, or, if surviving the father, his decease before the age of puberty. Such was the fundamental idea of substitution. Not that the father instituted an heir for his child, but that he instituted a second heir for himself who was only entitled to enter upon the estate, when the first heir failed. If he had instituted a second heir for the son, as has been sometimes affirmed, it is incomprehensible how in the later law the second heir came to be called the substitute, and the word "Substitutio" to be employed to denote the peculiar institution under consideration. No doubt, a change took place, subsequently, and the substituted heir was "*filio heres primus*," that is to say, he ceased to be regarded as the heir of the father, and became heir to the son. The institution, however, had so changed that it would be quite impossible to form a correct judgment as to its nature without the explanation already given. It is only by the knowledge of the origin of substitution that we can fully comprehend the later law of Rome. For although in the new institution the substituted heir was the *primus heres* of the son, the principles which regulated the older law were to a very great extent transferred to the more recent institution. In order to the existence of pupillary substitution it was necessary that the father should make his will, and that he should in that will institute an heir for himself. At the first glance it seems strange that the father should have power to make a will and institute an heir for his son whilst he himself might die intestate. But if it is clearly understood that originally the second heir was the heir of the father,

then the *substitutio pupillaris* is easily comprehended. If, for instance, the father made a will and appointed his own brother as heir to his impubes son, this brother, as a pupillary substitute and as heir, was *in loco patris*. This privilege, however, was not construed so as to enable the father to burden the son's private and separate estate, for there was a rule of law which said "*Pater de suo tantummodo legare potest*," the meaning of which is that the father had no power to burden his son's property except to the extent that his own property increased the son's estate. In the doctrine of pupillary substitution, a number of principles sprang out of, and were developed from, the fundamental principle that the *heres secundus* was originally an heir to the father and not the heir of the son. Although this principle in the later law was *formally* abrogated, it would be quite erroneous to suppose that a number of results which flowed from it did not remain long after in the valid laws of Rome. The quasi-pupillary substitution introduced by Justinian was formed on the pattern of the pupillary substitution which had long preceded it, and it was thus constituted. If a person entitled to make a testament had an insane descendant, then the *parens* could nominate an heir for the insane, since the insane person could not make a testament for himself in consequence of the continuance of his malady. In the details of the new institution established by Justinian, the emperor diverged from the ancient order of things, but the emperor himself says that he took the former institution as the pattern upon which to model his own reform. It is stated in the code in which the enactment is made, "*Ut occasione hujusmodi substitutionis, ad exemplum pupillaris, etc.*" l. 6. Cod. de inpub. et al. subs. (6. 26.) The above explanations will perhaps enable the student to understand the remarks made by Gaius upon the doctrine of Substitutio.

The subject cannot be minutely treated in a note; but the following observation will explain some of the most important principles of the later law. Several persons might unite in instituting a substitute for one person. Again, on the other

hand, several heirs could be substituted for one and the same person. There was an important rule regulating the application of this principle. “*Substitutus substituto censetur esse substitutus instituto* ;” that is to say, the person substituted for the substitute is held to be substituted for the instituted heir. It follows from this rule, that the person who is substituted with the co-heirs, if all the co-heirs fall away, takes not only the portion of the substituted persons, but also the portion of the persons instituted who have preceded them. The substitution is at an end as soon as the person instituted becomes heir : and also if the person substituted died before the instituted heir. Again, the testator desiring to make a pupillary substitution, could only do so when he named his own heir. He might institute his son, or an extraneous ; or he might disinherit his son, and still name a substitute for him ; but in this case he could not bestow any legacies upon the substitute. (“*Pater semper de suo legat.*”) The testator could, if he pleased, make the institution in writing, and the substitution by word of mouth : or both might be united in an appendix to his own will. In the last case the prescribed formalities need be only observed once, in the former case they must be observed twice. The testament for the *suus* was always regarded as an appendix to that of the father, and so closely were they connected, that the latter was invalid whenever the former was found to be so. The pupillary substitution was contained in a clause or *tabula* by itself, which was secured by the testator’s own thread and seal, with a provision in the first tablet of the will that the part of the will containing the substituted heirs should not be opened so long as the son lived and was *impubes*. *Ins. lib. s. 1. de vul. sub. (2. 15.)*

It may be as well to give in this place a brief explanation of what was called the *jus accrescendi*. The testator was always obliged, except in the case of the military testament, to dispose of his whole estate, in accordance with the maxim—“*Nemo pro parte testatus pro parte intestatus decedere potest.*” Thus, if an instituted heir died before

the testator, or if he disclaimed the inheritance, at first sight it would appear, as Mr. Sandars has stated, that "his share was undisposed of." Inst. Just. p. 291, note on s. 1. de vul. sub. (2. 15.) Such a view however is inaccurate. When the testamentary heir fell away, and there was not what was technically termed a "*case of transmission*," the rule was that the substituted heirs succeeded to the entire estate. If no substitution took place, then, in that case, there came into operation what has been called the *jus accrescendi*. The *jus accrescendi* between co-heirs, was a right of the civil law, and it was based upon this ancient but fundamental principle; namely, that every person to whom the inheritance was devised had a claim, not merely to a portion of the estate, but to the entire property of the defunctus. This claim to the whole inheritance was only limited by the similar claims of the co-heirs. If, for example, a Roman had said "Titius shall be my heir for one-half of my inheritance," then not simply the half but the whole of the estate was devised to Titius, even though the testator had said *in verbis expressis* that Titius should take only one-half. He was, as it was technically expressed, *heres ex asse*. He had a right to the entire property, and the creditors on their part had a claim upon him not for the half only but for the whole of the debts of the testator. The following maxim expresses the governing principle on this difficult subject. "*Solo concursu partes fiant*." The Roman jurists said that it was only because other heirs were called to the inheritance with him that the right of any to the whole property was limited. Thus, when several heirs were called to the inheritance, each one of them inherited not simply a part, but the entire estate. If this undoubted principle of Roman law is borne in mind the doctrines based upon it may be easily understood. The maxim which came into operation when one of the instituted heirs fell away was the following: "*Cessante concursu cessant partes*." Nothing can be simpler than this doctrine. With the falling away of one of the co-heirs, the parts or portions of the inheritance to

which he was entitled lapsed, but remained *pro ratione* with the surviving heir or heirs. The legal *personæ* entitled to the property were not constant. When any one fell away it was, to use an arithmetical illustration, a factor in the expression that had disappeared, which had only significance and value whilst it retained its place in the calculation. Such was the *jus accrescendi*. There was no increase to the surviving heir, for *ab initio* he was entitled to the entire estate, a right only limited by the existence of the co-heirs. What is remarkable and worthy of observation is this, that the *jus accrescendi*, or, as Von Vangerow has expressed it, the "*jus non decrescendi*," in the law of inheritance underwent no change throughout the whole course of the Roman law, in so far as the heirs of an intestate were concerned. In regard, however, to the heirs who claimed under a will, there were three marked periods or changes in the law. These have been designated: 1st. The *jus antiquum*. 2nd. The change introduced by the *lex Julia et Papia Poppæa*. 3rd. The alterations introduced by Justinian and the *caducum*. The *jus antiquum* was based upon the fundamental idea already explained. The change introduced by the *lex Papia Poppæa* was very great indeed, for it ordained that when a testamentary portion became *caducum ex post*, then the *jus antiquum* should not apply, but the *caducorum vindicatio ex lege Julia et Papia Poppæa*. By this means other persons were admitted to the succession, and the children and parents of the defunctus had a claim upon the property. The second change lasted from Augustus to Justinian, who restored the *jus antiquum* by the destruction of the *caducorum vindicatio*. Under Justinian the rule was "*Portio cum onere accrescit*," that is to say, the *jus accrescendi* was so modified that the co-heirs to whom it came took the inheritance with all the burdens upon it: l. unica. Cod. de cad. tol. (6. 5.) This constitution, however, was not received. Cic. Top. 10.; Marezoll Instit. p. 219.; Moehler's Pandecten, pp. 200, 201.; Scheurl's Instit. sec. 187. Art. "Heres Roman," Diet. Gr. et. Rom. Antiq.

Articuli "Succedere" et "Pupillaris" Hermann Handlexicon. Von Vangerow's Leitfaden. vol. ii. ss. 450, 451, 452.

175. Et licet nobis vel unum in unius locum substituere pluresve, et contra in plurium locum vel unum vel plures substituere.

176. Primo itaque gradu scriptus heres hereditatem cernendo fit heres et substitutus excluditur; non cernendo summovetur, etiam si pro herede gerat, et in locum ejus substitutus succedit. Et deinceps si plures gradus sint, in singulis similis ratione idem contingit.

175. And we are permitted to substitute a single individual or several persons in the place of one, and on the other hand one or more in the place of several.

176. Therefore, the party instituted in the first degree becomes heir upon declaring his acceptance of the inheritance, and excludes the heir that is substituted. But by not declaring his acceptance he is set aside, even though he act as heir, and the substituted heir succeeds in his place. And so on in succession if there are more degrees of substitution; the same rule similarly applies in each case. (o)

(o) As a general rule the instituted heir excluded the substituted one. But it sometimes happened that the heir instituted with the *cretio*, entered upon the inheritance without making the addition in the manner prescribed by law. In such a case the instituted heir could claim the inheritance, and oust the first heir who had not complied with the express terms of the will.

177. Sed si *cretio* sine exheredatione sit data, id est in hæc verba: SI NON CREVERIS TUM PUBLIUS MÆVIUS HERES ESTO, illud diversum invenitur, quia si prior omissa *cretione* pro herede gerat, substitutus in partem admittitur, et fiunt ambo æquis partibus heredes. Quod si neque cernat neque pro herede gerat, sane in universum summovetur, et substitutus in totam hereditatem succedit.

177. But if the same testator has given *cretio* without adding disinheritance, that is to say, in these words—"If you should decline acceptance, then Publius Mævius shall be my heir," a different rule applies; for if the first person instituted, having omitted to declare acceptance, acts as heir, the party substituted is admitted to a share, and they both become heirs with equal portions; but if the one first instituted neither declares acceptance nor acts as heir, certainly he is entirely excluded, and the substituted heir succeeds to the whole inheritance.

178. Sed dudum quidem placuit, quamdiu cernere et eo modo heres fieri possit prior, etiam si pro herede gesserit, non tamen admitti substitutum: cum vero *cretio* finita sit, tum pro herede gerentem admittere substitutum: olim vero placuit, etiam superante *cretione* posse eum pro herede gerendo in partem substitutum admittere et amplius ad *cretionem* reverti non posse. (p)

178. But it was long since decided that so long as it is possible for a person first instituted to declare acceptance, and in that manner to become the heir, even if he had acted as heir (*pro herede*), yet the substituted heir could not be admitted. But when indeed the period of the *cretio* is completed, then the person acting *pro herede* admitted the substituted heir. But formerly it was held that, even when the period for the *cretio* was unexpired, the instituted heir could admit the party substituted to a share, but under these circumstances he could not fall back again upon the *cretio*.

(p) "Posse eum pro herede gerendo, etc. . . . non posse." Huschke says that objection has been taken to the first "posse." Goeschen would have it expunged, and Lachmann changes it into "*priorem*." Huschke, however, after carefully examining all the circumstances connected with the *cretio*, is of opinion that it is the correct reading. It has thus been accepted by Gneist.

179. Liberis nostris inpueribus quos in potestate habemus non solum ita, ut supra diximus, substituere possumus, id est ut si heredes non extiterint, alius nobis heres sit; sed eo amplius, ut etiam si heredes nobis extiterint et adhuc inpueres mortui fuerint, sit iis aliquis heres, velut hoc modo: TITIUS FILIUS MEUS MIHI HERES ESTO. SI FILIUS MEUS MIHI HERES NON ERIT SIVE HERES ERIT ET PRIUS MORIATUR QUAM IN SUAM TUTELAM VENERIT, SCIUS HERES ESTO. (q)

179. Not only can we substitute in the manner we have just mentioned for our children under the age of puberty whom we have in our *potestas*, that is, so that some other person may be our heir, if our children do not become our heirs (*sui heredes*), but also, if they do become our heirs (*sui heredes*) and die under the age of puberty, we may substitute another heir in their place, as for example—"Let Titius my son, be my heir; if my son should not be my heir, or if he shall become my heir, and die before he becomes his own master (*in suam tutelam*), let Scius be my heir."

(*q*) Cicero says, “Si mihi filius genitus unus pluresve, is mihi heres esto. Si filius ante moritur quam in tutelam suam venerit, tu mihi—secundus heres esto.” De Invent. ii. 42. sec. 122. De causa M. Curii vid. Cic. de Or. i. 39, 57. ii. 6. 32. Brut. 39, 52, 73, pro Cæc. 18. Top. 10. Quintil. Inst. vii. 6. 9. Ulp. tit. xxiii. 7—9.

180. Quo casu si quidem non extiterit heres filius, substitutus patri fit heres: *si vero* heres extiterit filius et ante pubertatem decesserit, ipsi filio fit heres substitutus. Quamobrem duo quodammodo sunt testamenta: aliud patris, aliud filii, tamquam si ipse filius sibi heredem instituisset; aut certe unum est testamentum duarum hereditatum.

Just. ii. 16. 2.

181. Ceterum ne post obitum parentis periculo insidiarum subiectus videatur pupillus, in usu est vulgare quidem substitutionem palam facere, id est eo loco quo pupillum heredem instituimus: *nam* vulgaris substitutio ita vocat ad hereditatem substitutum, si omnino pupillus heres non extiterit; quod accidit cum vivo parente moritur, quo casu nullum substituti maleficium suspicari possumus, cum scilicet vivo testatore omnia quæ in testamento scripta sint ignorentur. Illam autem substitutionem per quam, etiamsi heres extiterit pupillus et intra pubertatem decesserit, substitutum vocamus, separatim in inferioribus tabulis scribimus, easque tabulas proprio lino propriaque cera consignamus; et in prioribus tabulis cavemus, ne inferiores tabulæ vivo filio et adhuc inpubere aperiantur. Sed longe tutius est utrumque genus

180. In which case, if the son fail to become heir, the person substituted is heir to the father; but if the son become heir, and die before puberty, the person substituted becomes heir to the son. Thus, there are in a certain manner two testaments, the one of the father and the other of the son, as if the son had appointed a heir for himself; or at least there is but one testament for two inheritances.

181. Moreover, in order that the pupil might not be exposed to the danger of unfair artifice after the decease of his father, it was usual to make the common form of substitution quite openly, that is to say, in the place where a pupil has been appointed to the inheritance; for common substitution only calls the person substituted to the inheritance, if the pupil cannot possibly be heir; and this happens when he dies during the lifetime of his father, in which case no misconduct can be suspected on the part of the person substituted, since that which is written in the testament remains unknown during the lifetime of the testator. But that substitution, by which we designate the person substituted, if the pupil should be heir but die before the time of puberty, we inscribe separately on the last tablets, and we secure these tablets with a special thread, and seal them

substitutionis separatim in inferioribus tabulis consignari, (r) quod si ita consignatæ vel separatæ fuerint substitutiones, ut diximus, ex priore potest intellegi in altera quoque idem esse substitutus. (s)

JUST. ii. 16. 3.

(r) *In inferioribus tabulis.* These were the “secundæ sive pupillares tabulæ,” as distinct from the “primæ sive priores.”

(s) The text explains the precautions taken by the father, to prevent any unfair dealing on the part of those substituted in the event of the pupil who had become heir dying before attaining the age of puberty. As the substituted heirs were not known until the death of the impubes, there was no inducement held out to deal unfairly with the infant heir, in order to obtain the inheritance.

182. Non solum autem heredibus institutis inpueribus liberis ita substituere possumus, ut si ante pubertatem mortui fuerint, sit is heres quem nos voluerimus, sed etiam exheredatis. Itaque eo casu si quid pupillo ex hereditatibus legatisve aut donationibus propinquorum adquisitum fuerit, id omne ad substitutum pertinet.

JUST. ii. 16. 4.

183. Quæcumque diximus de substitutione inpuerum liberorum, vel heredum institutorem vel exheredatorem, eadem etiam de postumis intellegemus.

JUST. ii. 16. 4.

with a separate seal; moreover, we provide in the first tablets that the latter ones shall not be opened during the lifetime of the son, nor before he attain the age of puberty. But it is far safer that both kinds of substitution be separately signed in the last tablet, because if the substitutions have been signed and separated, as we have already said, it can be ascertained from the first tablets that the same person has been substituted in the second.

182. For we can not only substitute for our children under the age of puberty, whom we have instituted as our heirs, in such a way that if they die before the age of puberty, he whom we have chosen shall be heir, but we may also substitute for our disinherited children. Hence, in such a case, whatever has been acquired by the minor, being a pupillus either by succession, by legacies, or by gifts from relations, will pass over entirely to the substituted heir.

183. Whatever we have said in regard to the substitution of our children under the age of puberty, whether instituted heirs or disinherited, we wish to be understood as also applicable to posthumous children.

184. Extraneo vero heredi instituto ita substituere non possumus, ut si heres extiterit et intra aliquod tempus decesserit, alius ei heres sit: sed hoc solum nobis permissum est, ut eum per fideicommissum obligemus, ut hereditatem nostram vel totam vel *pro parte* restituat; quod jus quale sit, suo loco trademus. (*t*)

184. But, to an *extraneous* whom we have instituted as our heir, we cannot substitute another heir in such a way that if the *extraneous* become heir and die within a certain time, another shall be his heir. But this only is allowed us that we may oblige him by a *fidei commissum* to restore our inheritance, either wholly or in part. What the law is on this point, we will explain in its proper place.

JUST. II. 16. 9.

(*t*). Domenget says that French law authorizes vulgar substitution; but that it does not admit of pupillary substitution nor of the *fideicommissum*. The latter term will be hereafter explained. See Domenget in loco, p. 232.

185. Sicut autem liberi homines, ita et servi, tam nostri quam alieni, heredes scribi possunt. (*u*)

185. But free persons, as well as slaves, both our own and those belonging to others, can be instituted heirs.

(*u*) The institution of a son (*suus heres*,) could not be subjected to a condition, unless it was a *conditio non potestiva*. Thus Ulpianus says, "*Suus quoque heres sub conditione heres potest institui. Sed excipiendus filius, quia non sub omni conditione institui potest; et quidem sub ea conditione, quae est in potestate ipsius, potest, de hoc enim inter omnes constat, etc.*" l. 4 and see also l. 86 Dig. de hered. instit. (28. 5). An heir might be selected from among slaves, or from free persons. This was the general rule, but it was subject to many exceptions. Thus Peregrini could not take anything under a testament. Nor could an uncertain person be instituted as heir to a testament; nor a widow who had not observed her year of widowhood; nor a woman according to the *lex Voconia*, by any one who had more than 100,000 asses. There were also certain grounds of incapacity relating to incestuous children, and their fathers and mothers. Ulp. xxii. tit. 2. 4. l. 1. Cod. de secund. nup. (5. 9.) Gai. ii. 27 l. l. 6. Cod. de incest. (5. 5.) Domenget pp. 232. 233.

186. *Sed noster servus simul et liber et heres esse juberi debet, id est hoc modo: STICHUS SERVUS MEUS LIBER HERESQUE ESTO, vel HERES LIBERQUE ESTO.*

187. *Nam si sine libertate heres institutus sit, etiam si postea manumissus fuerit a domino, heres esse non potest, quia institutio in persona ejus non constitit; ideoque licet alienatus sit, non potest jussu domini cernere hereditatem.*

188. *Cum libertate vero heres institutus, si quidem in eandem causamanserit, fit ex testamento liber idemque necessarius heres. Si vero ab ipso testatore manumissus fuerit, suo arbitrio hereditatem adire potest. Quodsi alienatus sit, jussu novi domini adire hereditatem debet, et ea ratione per eum dominus fit heres: nam ipse alienatus neque heres neque liber esse potest. (v)*

186. But our own slave ought to be declared free and heir at the same time, that is to say, in the following manner: "My slave Stichus shall be free and heir," or "shall be heir and free."

187. For if he be instituted to the inheritance without freedom, he cannot be heir, even if he has been subsequently manumitted by his master, because the institution has no continuance in his person; and thus, although he be alienated, he cannot decide to enter upon the inheritance by the command of his master.

188. But when he is instituted heir with freedom, if he has remained in the same condition, he becomes free on the ground of the testament, and at the same time *heres necessarius*. If he has been manumitted by the testator himself, he can enter upon the inheritance or not, at his own option. But if he has been alienated, he ought to enter upon the inheritance by the order of his new master, and thereby the master becomes heir through him: for the alienated slave can be himself neither heir nor free.

(v). This section, Domenget observes, does not contradict the preceding one: the first supposes that an owner has instituted his slave as heir, without at the same time giving him his liberty; and since at the time of Gaius, a slave, as such, could not be instituted heir, the institution could not become subsequently valid, even though the slave were enfranchised or alienated. The second case supposes institution to have been regularly made, and consequently that the slave had become *heres et necessarius*, if he remained the property of the testator; or if he became heir of an

extraneus, having been freed after the making of the testament he choose to make addition, or to enter upon the inheritance; in the third case, it is to be understood that the new master was heir, if the slave accepted the inheritance by his instructions. In this last case, the simple change in the will of the old master, might result in the slave losing his liberty, but did not destroy the institution, for a testament was not destroyed upon the simple presumption that the testator had changed his mind. If the enfranchisement of the slave were conditional, the slave could not become heir so long as the condition was in suspense, although he had been instituted purely and simply in such a manner, that if the condition failed, he could not receive the inheritance. See Domenget in loco.

189. *Alienus quoque servus heres institutus, si in eadem causa duxerit, jussu domini hereditatem adire debet; si vero alienatus fuerit ab eo, aut vivo testatore aut post mortem ejus antequam adeat, debet jussu novi domini cernere. Si manumissus est antequam adeat, suo arbitrio adire hereditatem potest.*

189. Also, the slave of another being appointed heir, if he continue in the same condition must enter upon the inheritance by the command of his master. But if the slave be alienated from his former owner in the lifetime of the testator, or after his death, and before actually entering upon the inheritance, he ought, by the command of his new master, to come to a decision as to acceptance. If he be manumitted before he has entered upon the inheritance, he may enter upon it or not at his own option.

JUST. II. 14. 1.

190. *Si autem servus alienus heres institutus est vulgari cretione data, ita intellegitur dies cretionis cedere, si ipse servus scierit se heredem institutum esse, nec ullum impedimentum sit, quominus certiores dominum faceret, ut illius jussu cernere possit. (w)*

190. But if a slave belonging to another is instituted heir with the common *cretio*, then the days of the *cretio* are understood to count, from the period when the slave himself first had knowledge of his institution, and no hindrance existed to his informing his owner, in order that he might decide upon acceptance by command of his master.

JUST. II. 14. 1.

(w) A testator might legally institute as his heir, the slave of another person; but it was the duty of the instituted slave to give his owner prompt notice. If the slave concealed from his master his institution as heir, he was punished by the loss of any benefit that would otherwise have accrued to him under the will.

191. Post hæc videamus de legatis. Quæ pars juris extra propositam quidem materiam videtur; nam loquimur de his juris figuris quibus per universitatem res nobis adquiruntur. Sed cum omnimodo de testamentis deque heredibus qui testamento instituuntur locuti sumus, non sine causa sequenti loco poterat hæc juris materia tractari.

191. After these things let us consider "legacies." This part of the law seems indeed to fall somewhat beyond our present subject, for we are speaking of those forms of law by which we acquire things "per universitatem," but since we have spoken generally of testaments, and heirs instituted under a testament, we may not improperly in the next place treat of this branch of law.

JUST. II. 20. pr.

192. Legatorum utique (x) genera sunt quattuor: aut enim per vindicationem legamus, aut per damnationem, aut sinendi modo, aut per præceptionem.

192. Thus there are four kinds of legacies, for we may bequeath by *vindicatio*, or by *damnatio*, or permissively (*sinendi modo*), or by *præceptio*.

(x) The word *itaque* is found in the MS. and the earlier editions. Van der Hoeven proposed to read *utique*, which has been followed by Boecking and Huschke. It is in the style of Gaius to use *utique* in introductory sentences. See for instance, i. 13, 52, 110, 144.; ii. 2., etc. Huschke's Kritik. p. 48.; Boecking's Gai. p. 134.

193. Per vindicationem hoc modo legamus: LUCIO TITIO verbi gratia HOMINEM STICHUM DO LEGO. Sed et si alterutrum (y) verbum positum sit, velut: *hominem Stichum do*, per vindicationem legatum est. Si vero etiam aliis verbis velut *ita legatum fuerit*: *sumito*, vel *ita: sibi habeto*, vel *ita: CAPITO*, æque per vindicationem legatum est.

193. We bequeath by *vindicatio* in the following manner: "To Lucius Titius," for example, "I give, I bequeath the slave, Stichus;" but also if only one of the two words be used, for example "I give the slave, Stichus," he is bequeathed by *vindicatio*; but if indeed other words are employed, as for example the legacy is expressed thus: "Let him take the slave, Stichus," or "Let him have him for him-

self," or thus, "Let him acquire;" the legacy is equally granted by *vindicatio*.

(y) The word "*alterutrum*" is an emendation. Boecking reads "*alterum*," in accordance with the MS. and the opinion of Huschke. The latter critic says that "*alteru*" is clearly written in the Veronese code. "*Alter*" is very often used for "*alteruter*," but in the present passage "*alter*" in its usual sense—one of two—gives the better reading. Frotscher, in Quintil. x. 1. 26, has collected a number of examples.

In confirmation of the correctness of the reading "*sumito*" see especially Serv. ad *Æn.* v. 533: "*Sume, pater—præcipe, nam verbum est jurisconsultorum, quo utuntur, quotiens legatum non ab herede datur sed est in accipientis arbitrio.*" Huschke's *Kritik*, p. 48.

194. *Ideo autem per vindicationem legatum appellatur, quia post aditam hereditatem statim ex jure Quiritium res legatarii fit; (z) et si eam rem legatarius vel ab herede vel ab alio quocumque qui eam possidet petat, vindicare debet, id est intendere eam rem suam ex jure Quiritium esse.*

194. Therefore this legacy is called *per vindicationem*, because immediately after entrance upon the inheritance, the property bequeathed belongs to the legatee *ex jure Quiritium*, and if the legatee would claim this property either from the heir, or from another party who seeks to possess it, he must do this by means of the *vindicatio*, that is to say, assert that the thing belongs to him *ex jure Quiritium*.

(z) In Roman law there were two kinds of bequests, *legatum* and *fideicommissum*. The former was the ancient mode, the latter arose, as will be hereafter more fully explained, in the time of Augustus. Ulpianus defines a legacy as follows: "*Legatum est quod legis modo, id est imperativo testamento relinquitur.*" And then he adds, "*Quæ præcativo modo relinquuntur, fideicommissa vocantur.*" tit. xxiv. For the origin of legacies we must go back to the

laws of the Twelve Tables. Pomponius says, “*Verbis legis duodecim tabularum his: Uti legassit suæ rei, ita us esto*, latissima potestas tributa videtur, et heredis instituendi, et legata et libertates dandi, tutelas quoque constituendi.” l. 120 de verb. sign. (50. 16.) During the age of the Republic there were no ordinary bequests: *legata* were the only form of bequests then known to the Roman law. In the early age of Rome, there appear to have been imposed by the testator upon the inheritance, “*leges mancipationes*” and the heir was bound by a contract arising out of the *mancipatio* to pay such bequests as the defunctus had imposed upon his estate. This peculiar mode of bequeathing a legacy was after a time superseded, and the legacies that the testator intended to give, came to be written upon the *tabulæ* of the testaments in which they were found. The heir was no longer bound *ex contractu*, but he was liable *quasi ex contractu*. Ins. s. 5. de obl. quæ quasi ex contr. (3. 27). It now became necessary that all legacies should be written in a testament, or in a codicil, *confirmed* in the manner prescribed by law, so as to have the same effect as a testament. Legacies in an unconfirmed codicil were invalid, *ab initio*, as it was only the direct testamentary heir that could be burdened with legacies. Ulpianus says, “*Legatum, quod datum est, adimi potest vel eodem testamento, vel codicillis testamento confirmatis, etc.*” Tit. xxiv. sec. 29. A *legatum* was always viewed by the Romans as a part of the *hereditas* subtracted from the heir and given to another. Hence the phrase “*ab herede legare.*” Florentinus says, “*Legatum est delibatio hereditatis, qua testator ex eo, quod universum heredis foret, alicui quid collatum velit.*” l. 116. Dig. de leg. et fid. (30). Again, Modestinus tersely says, “*Legatum est donatio testamento relicta.*” l. 36. Dig. de leg. et fidei. (31). “*Solo testamento hereditates et legata relinquuntur*” is a maxim of the Roman civil law. Every legacy implies a testament, and the burden of the legacy in every case must fall on the heir or heirs instituted thereby. The testator required the *testamenti-factio*

activa to entitle him to make a will, and the legatee must also have the *testamenti factio passiva* to enable him to receive a legacy. He must also be what the Romans termed *capax*. “*Legari autem illis solet, cum quibus testamenti factio est.*” Ins. sec. 2, 4. de legat. (2. 20.) All that has been previously said in relation to the *testamenti factio*, both active and passive, with respect to the *hereditas* is equally true and applicable in regard to legacies. Thus, for example, the incapacity arising from the *lex Julia et Papia Poppæa* applied with full force here, just as much as in the institution of the heir. The terms also used to give a legacy, as well as for the institution of an heir needed to be *verba concepta*, in the Roman language, and also in the authoritative form of a law (*legem dicit*), for a legacy is “imperative *testamento relinquitur.*” In what was denominated the classical period of the Roman Law, there were, as Gaius explains, four distinct kinds of legacies. “*Per Vindicationem; per Damnationem; Sinendi modo; per Præceptionem.*” It is necessary carefully to note the peculiarities of these different modes of bequests. 1. *Legatum per Vindicationem*. In constituting this kind of legacy, the formal words that were required to be used were “*Do lego,*” as for example, “*Sempronius fundum mihi do lego,*” but the word “*sumito,*” or “*sibi habito,*” or “*capito,*” as we learn from Gaius, might also be used. The words, however, “*do lego*” were those most frequently employed. Property could not be devised “*per Vindicationem,*” unless it were in the full *quiritarian* ownership of the testator. This was not only requisite at the time of the making of the will, but it was necessary that the owner should hold it by the same right at the moment of his death. If such were not the case, then the legacy “*per Vindicationem*” was utterly invalid. When, however, a legacy was left in this way, and all the formalities had been so strictly observed that the right of the legatee could not be impeached, the effect was, that the person to whom the bequest had been made, was not simply entitled to an action *in personam*, but it was held that, to use the expression of

the jurists, the property went to him "*recta via*," and he was entitled as legatee to the "*rei vindicatio*." Hence, this mode of legacy was named the "*legatum per Vindicationem*." There arose a great dispute with the ancient Roman jurists as to this form of legacy. It was indeed one of the controversies that divided the schools. The Proculians held that from the very moment the legatee declared that he would accept a legacy, he was legally entitled to the property; but that till then the legacy was a *res nullius*. They held that when the legatee declared his willingness to accept, it passed to him as already observed *recta via*. The Sabinians on the other hand controverted this opinion and on their part affirmed, that at the very instant the heir entered upon the inheritance, the devised property vested in the legatee, and that without any expression of intention on his part. They maintained that no declaration of his will was required, and that the property was not for a moment without an owner, as a *res nullius*. They also held that if the legatee disclaimed the legacy, there was a "*revocatio ex tunc*." The view of the Sabinians was subsequently held to be the correct one, and it passed into the later Roman law; whilst that of the Proculians was rejected. The Sabinians were of opinion that in the case of a conditional legacy "*per Vindicationem*," during the pending of the condition the heres was the owner, but that when the condition became, as it were, *impleta* there was a retro-action, and the right of the legatee to the property dated from the instant it came into the possession of the heir. Upon this point there was another divergence of opinion in the different schools; the Proculians affirming that until the accomplishment of the condition, the bequest was a *res nullius*, and the Sabinians in accordance with the view just explained, strenuously maintaining that it was held as the property of the heir. This controversy was one that stood obviously in close connection with the Roman law relating to conditions. When several persons succeeded to the same thing "*per Vindicationem*," whether the testator had declared that they should

take *conjunctim* or *disjunctim*; the same rule applied, namely "Partes semper concursu fiunt." Hence the Roman jurists said, "Concursu cessante partes cessant." The legacy thus left was equally divided so that whenever any of the parties entitled fell away, the portion accrued to the others by the "jus accrescendi." A legacy was said to be *conjunctim* when several persons were named in the same clause or proposition, as "Gaio et Sempronio fundum Cornelianum Do Lego." Here each was entitled to one-half, and if one did not take, the other became entitled to the entire legacy. A legacy might also be left to two or more persons in a manner that was termed *disjunctim*. For example, "Gaio fundum meum Cornelianum Do Lego. Sempronio fundum meum Cornelianum Do Lego." In such a case both the legatees had an equal right to the legacy, and when one of them was removed the other took the whole. In this kind of bequest the principle of the "jus accrescendi," or rather of the "jus non decrescendi," came into operation.

2. "Legatum per Damnationem." The form of words employed in such a legacy was the following: "Heres meus Stichum servum meum dare damnas esto." Or the shorter form, "Heres meus Stichum, etc., dato." The technical and important words were "dare damnas." This form of legacy was applicable to every species of property, and the thing devised might be not only the property of the testator, but even, which seems strange to us, that of a third party. This kind of bequest was quite different from the legacy "per Vindicationem." The ownership of the thing bequeathed did not pass to the legatee, but the heres was laid under an obligation to give it, or its equivalent, to the legatee, and the latter could sue the heir by the action known as the "Condictio certi." This was a legal process to obtain a "certa pecunia," or "alia certa res." Ulpianus, with his usual clearness, explains the nature of this action when he says, "Certi condictio competit ex omni causa, ex omni obligatione, ex qua certum petitur, etc." l. 9. Dig. de reb. cred. (12. 1). This action was also said to be *stricti juris*, and the

rule of law was “*Contra inficientem in duplum competit.*” Just as in like manner an action out of the Aquilian law, was for a duplum. “*Actio legis Aquiliæ . . . adversus negantem in duplum competit.*” l. 23. s. 10. Dig. ad legem. Aquil. (9. 2). As the action against the heir was *in duplum*, it was on this account that it was said to be “per damnationem.” A legacy however left in this way gave no right to the Vindicatio; for the only legal remedy in the power of the legatee was the Condictio, as just explained. When several persons were entitled to legacies it was necessary to note carefully whether they were called *conjunctim* or *disjunctim*. When two legatees were entitled *conjunctim* each took one half of the property devised; but when one fell away there was no jus accrescendi, as in the case of the legacy per Vindicationem. There was an obligation, but, to use the expression of the German jurists, it was *severed* and shared by the two legatees. The heir was bound to give to Sempronius and to Gaius the fundum Cornelianum, and when one fell away, the other had no claim for his half, and the so-called jus accrescendi was held to be not applicable. When however a legacy was left by this form of devise—*disjunctim*—each of the legatees had a claim upon the entire bequest; but as only one could receive the thing devised, the other legatee had a claim against the heres for the full value (æstimatio) of the thing so devised. Thus it is manifest that in the “legatum per Damnationem” the jus accrescendi entirely vanished; and that this mode of bequest stood in direct opposition to the “legatum per Vindicationem” This distinction, so sharply defined by the Roman jurists, was inferred from the very words of the devisor. In the former case, the actual property was left by the testator, and the words “Do Lego” were employed to denote this. In the latter case there was held to be no such devise, but all that the words used in the will gave rise to, was an obligation. It was held to be quite a different thing when the testator said in the one case that the legatee should be entitled to have the thing itself which was devised, and his

saying that the heir should be only placed under an obligation to deliver it to him.

3. The third form of legacy was the "*legatum Sinendi modo*," and the formal words were these: "*Heres meus damnas esto sinere Lucium Titium hominem Stichum sumere sibi que habere.*" In this way the heir might be compelled to give his own property, as well as that of the testator. It should be carefully observed that the technical and important word in this form was not *dare*, but *sinere*. It is as though the defunctus had said "My heir shall suffer or permit Lucius Titius to take such and such things." In the form of legacy previously explained the heir, we say, was bound to a *dare*; in this case he was only bound to a *pati*, or to a *facere*, in the technical sense of these expressions. The heir was under an obligation to suffer the legatee to take a thing, and as it is manifest that he had not the power to grant this in the case of another's property, although his own was liable if he accepted the hereditas, the property of an extraneus could not be devised by such a form of bequest. But the "*legatum Sinendi modo*" was valid as far as the possessions of the testator and the heir were concerned. This form of legacy stood as it were mid-way between the "*legatum per Vindicationem*" and the "*legatum per Damnationem*." In the former mode the thing devised was the property of the testator, in the latter it might be the property of any person whatever; but in the "*legatum Sinendi modo*" it must needs be either the property of the testator or that of the heir. Nor had the legatee the power to proceed against the heir by the "*condictio certi*," for the "*duplum*" was not due to the legatee, as there was no obligation for a *dare* but only for a *facere*. The nature of this distinction will be more clearly understood when we come to treat of Obligations in the Third Book, and of the "Action" in the Fourth Book of these Commentaries. If there were two legatees entitled "*Sinendi modo conjunctim*," it was held that each had a claim for the half of the bequest, and that the "*jus accrescendi*" was applicable. When the

legacy however was left to more than one person *disjunctim* most of the Roman jurists were of opinion that the ownership was controlled by the maxim, "occupantis melior est conditio." If one came to claim the thing left by the testator to him and another *disjunctim*, and found that his colleague had already possession of the property, he who had the thing kept it, and the claim of the other remained unsatisfied. Both could not have the bequest, and as the heir was only bound to a *pati*, and not to a *dare*, most of the jurists held that there was no further legal demand against the heir, and that the person who was fortunate enough to get the property, obtained no more than what he was entitled to. Still, some jurists were of opinion that the same principles were applicable as in the case of the "legatum per Damnationem," so that if one of the legatees took the thing, the other had a claim against the heres for the "æstimatio." This form of legacy did not admit of any "jus accrescendi."

4. The last form of legacy to be mentioned is the so-called "legatum per Præceptionem." The formal words in this case were "Lucius Titius hominem Stichum præcipito." The term "præcipito" was explained as meaning "præcipium sumito," that is "take beforehand." There was a dispute in the schools over this form of legacy. The Sabinians taught that it was valid if the person to whom it was left was also made heres, but that when it was made to an extraneus it was null and void. The Proculians, on the other hand, held that it had the same effect as if the thing belonged to the testator by the "legatum per Vindicationem." The various forms of legacies are thus explained by Ulpianus: "Per vindicationem legari possunt, res quæ utroque, tempore, ex jure Quiritium testatoris fuerit, mortis, et quando testamentum faciebat . . . Per damnationem omnes res legari possunt, etiam quæ non sunt testatoris, dummodo tales sint, quæ dari possint. Liber homo aut res populi aut sacra aut religiosa nec per damnationem legari potest, quoniam dari non potest. Siuendi modo legari possunt res propriæ testatoris et heredis ejus. Per præceptionem legari possunt

res, quæ etiam per vindicationem." Ulp. tit. xxiv. 7—11. The cardinal passages upon this subject will be found in Gaius ii. 192 et seq. See also the note on sec. 212 of this book. Dig. de legat. et fidei. lib. xxx.—xxxii. Cod. com. de leg. et fid. (6. 43). Ins. de legatis (2. 20).

195. In eo vero dissentiunt prudentes, quod Sabinus quidem et Cassius ceterique nostri præceptores quod ita legatum sit statim post aditam hereditatem putant fieri legatarii, etiamsi ignoret sibi legatum esse dimissum, et postea quam scierit et repudiaverit, tum perinde esse atque si legatum non esset: Nerva vero et Proculus ceterique illius scholæ auctores non aliter putant rem legatarii fieri, quam si voluerit eam ad se pertinere. Sed hodie ex Divi Pii Antonini (a) constitutione hoc magis jure uti videmur quod Proculus placuit. Nam cum legatus fuisset Latinus per vindicationem coloniæ: deliberent, inquit, decuriones an ad se velint pertinere, proinde ac si uni legatus esset.

195. But the juriconsults hold different opinions on this point; for Sabinus indeed and Cassius, and other doctors, think that what has been so bequeathed vests immediately in the legatee after entrance (*aditio*) upon the inheritance, even if he be ignorant that a legacy has been left him; but if, upon subsequent knowledge, he shall repudiate the legacy, it is then as if nothing had been left to him; Nerva and Proculus and the doctors of the opposite school think that the thing only belongs to the legatee, when he has expressed his intention to accept it. But, at the present time, in virtue of a constitution of the Emperor Antoninus, we appear to receive rather the opinion of Proculus; for, when a Latinus had been bequeathed *per vindicationem* to a colony, this Emperor ordained that the Decuriones should decide whether they wished this legacy to belong to themselves, in the same manner as if he had been bequeathed to a single individual.

(a) It has been observed that this is the first time that Gaius calls the Emperor Antoninus *Divus* and *Pius*, from which it has been supposed that Antoninus was dead, and that the first book and part of the second were written during his lifetime, whilst the remaining portion of the work was composed under Marcus Aurelius. See Domergue in loco, and the Introduction to this work, pp. 5, 6. It is

by no means certain that the term "Divus" is to be taken in the sense of "deceased." Its probable meaning is "highly blessed," and its etymology from Theios, and that again from Dios, gives the exact historical idea of the word, namely, "one sprung from Zeus." It was in this way it came to mean "of blessed memory." As already observed, Gaius, in sec. 126 of this book, says "set nuper imperator Antoninus." There is perhaps as much reason to suppose that the emperor was dead when he wrote that passage, as when he employs the term "Divi" in the present section. See Hermann's Handlexicon sub voce "Divus," and l. 26. Cod. de don. inter vir., etc. (5. 16.), where the phrase "Divus Imperator" is used of a *living* emperor.

196. *Hæc autem solæ res per vindicationem legantur recte quæ ex jure Quiritium ipsius testatoris sunt. Sed eas quidem res quæ pondere, numero, mensura constant, placuit sufficere si mortis tempore sint ex jure Quiritium testatoris, veluti vinum, oleum, frumentum, pecuniam numeratam. Ceteras res vero placuit utroque tempore testatoris ex jure Quiritium esse debere, id est et quo faceret testamentum et quo moreretur: alioquin inutile est legatum.*

196. Only those things can be legally bequeathed by *vindicatio*, which belong to the testator *ex jure Quiritium*; as to those which are reckoned by weight, number and measure, it is thought to be sufficient if at the time of the decease of the testator they were his *ex jure Quiritium*, as, for example, wine, oil, grain, ready money; but as to other things, the testator ought to possess them, as it is thought, at both periods *ex jure Quiritium*, that is to say, both at the time of the making of his will, as well as at the period of his decease; otherwise the legacy is invalid.

197. Sed sane hoc ita est jure civili. Postea vero auctore Nerone Cæsare senatusconsultum factum est, quo cautum est, ut si eam rem quisque legaverit quæ ejus numquam fuerit, perinde utile sit legatum, atque si optimo jure relictum esset. Optimum autem jus est per damnationem legatum; (b) quo genere etiam

197. But certainly this is so only by the *jus civile*; for, subsequently, by the authority of the emperor Nero, a senatus-consultum was made, in which it was provided, that if anyone had bequeathed property which he had never had in his possession, the legacy should be as valid as if the thing had been

aliena res legari potest, sicut inferius apparebit.

bequeathed in strict accordance with law (*optimo jure*). The words "*optimum jus*" apply to a legacy *per damnationem*, by which species even the property of another (*res aliena*) can be bequeathed, as will further appear hereafter.

(*b*) Gaius thus speaks, not because the legacy *per damnationem* had any advantage in the action by which it could be enforced, for the legatee in this case could not avail himself of the *vindicatio*, but because it permitted the testator to extend the range of property that he took in view at the time of the making of his will. Then, again, it was a less formal mode of making a bequest. For the changes introduced in the law of legacies by the *senatus-consultum Neronianum*, the reader is referred to the note on sec. 212 of this book. It was by this enactment that an inroad was first made upon the four kinds of legacies already explained. This law ordained that every legacy which might be deemed invalid on account of the words in which it was expressed, should notwithstanding this formal defect, be regarded as legally made; "*atque si optimo jure relictum esset.*" The great changes introduced by such amendment of the law were especially manifest in relation to the "*legatum per damnationem.*" If the bequest was not valid "*per vindicationem*" or "*per praeceptionem,*" on account of the thing bequeathed being the property of another person—or if a legacy "*sinendi modo*" was invalid because the devised thing belonged neither to the testator nor to the heir, still these various modes of bequest, as well as the "*legatum per damnationem*" were upheld "*ex senatus-consulto Neroniano.*" The Sabinians were by no means agreed as to the extent of the operation of this *senatus-consultum*. Sabinus himself was of opinion, that if a bequest were made to an *extraneus* "*per praeceptionem,*" which according to his view was not valid, this bequest could not convalesce by virtue of the *senatus-consultum Neronianum*, since this enactment only

cured the *vitia verborum*, whilst in such a case there was a failure in the person of the legatee. But Julianus and also Sextus (or ex Sexto) correctly held, that this was a defect, not in the person, but in the formal words employed, and that if for example the words of the “*legatum per damnationem*” were used, the legacy was still valid. It was otherwise if anything were devised to a person who was not entitled to hold even “*per damnationem*,” as for instance to a peregrinus, or to any one else who had not the “*testamenti factio*,” for to such cases the *senatus-consultum* was not applicable. See Gans. Schol. zum Gai. pp. 339, 340. (Gai. ii. 218. l. 21. Cod. de leg. (6. 37.); l. 1. Cod. comm. de leg. (6. 43.)

198. Sed si quis rem suam legaverit, deinde post testamentum factum eam alienaverit, plerique putant non solum jure civili inutile esse legatum, sed nec ex *senatusconsulto* confirmari. Quod ideo dictum est, quia etsi per *damnationem* aliquis rem suam legaverit eamque postea alienaverit, plerique putant, licet ipso jure debeat legatum, tamen legatarium petentem per *exceptionem doli mali* repelli quasi contra voluntatem defuncti petat.

199. Illud constat, si duobus pluribusve per *vindicationem* eadem res legata sit, sive conjunctim sive disjunctim, si omnes veniant ad legatum, partes ad singulos pertinere, et deficientis portionem collegatario adcrecere. Conjunctim autem ita legatur: TITIO ET SEIO HOMINEM STICHUM DO LEGO; disjunctim ita: LUCIO TITIO HOMINEM STICHUM DO

198. But if anyone has bequeathed his property, and alienated it after having made a testament, according to the opinion of most, the legacy is not only invalid by the *jus civile*, but cannot be confirmed on the ground of the *senatus-consultum*. This is so said, because according to the general opinion, if anyone has bequeathed his property *per damnationem*, and has subsequently alienated it, although the legacy becomes due *ipso jure*, yet the legatee demanding it can be repelled by the *exceptio doli mali*, as claiming it against the will of the deceased.

199. It is also evident, that if the same property is bequeathed to two or more persons by *vindicatio*, whether conjunctively or disjunctively, and all concur in claiming the legacy, equal parts belong to each; and the share of one failing to make good his claim, increases that of the co-legatees. Now a person bequeaths conjunctively as follows: “I give

LEGO. SEIO EUNDEM HOMINEM DO
LEGO. (c)

and bequeath to Titius and Seius the slave Stichus." Disjunctively thus: "I give and bequeath the slave Stichus to Lucius Titius. I give and bequeath the same slave to Seius."

(c) One and the same thing may be devised to several persons and by the same testament. In such a case the co-legatees are called *conjoint*; their legacies being given to them conjointly. Legatees might be conjoint in three ways, viz., *re*, *re et verbis*, and *verbis tantum*. l. 152. Dig. de verb. sig. (50. 16). Legatees were conjoined *re*, when the testator had devised the same thing by distinct dispositions, and without any restriction of the right over any part of the thing devised. Celsus says "Conjunctim heredes institui, aut conjunctim legari, hoc est totam hereditatem, et tota legata singulis data esse." l. 80. Dig. de legatis 3. (32). There was also equally conjunction between co-legatees, when the same part of anything was left them by separate dispositions. l. 142. Dig. de verb. sig. (50. 16). A legacy was said to be *re et verbis* when the same thing was devised to several co-legatees. Thus, "I devise my dwelling to Titius and Mævius, or to Titius with Mævius." l. 40 Dig. de usu. et usuf. l. 16. s. 2. de legat 1. (30). Even if the testator had not employed the conjunctive particles *cum* and *et*, there was conjunction if he had called the two legatees by the same disposition. Thus, "I wish that Titius, Mævius, may be legatees of my dwelling."

Legatees were conjoint *verbis tantum*, who were called *each* to a definite or determined portion, provided that this was done in the same disposition. l. 89. Dig. de legatis 3. (33). When the co-legatees were all qualified to receive the legacies left them at the opening of the will, they rendered them valid in the following manner:—if they were conjoint *re tantum*, as each co-legatee had a right of property over the thing, he could demand it entire, but the claims of his co-legatees prevented his receiving more than a part. When

the legatees were conjoint *re et verbis* or *verbis tantum*, each had his portion of the thing bequeathed. See further on this subject the excellent note of Domenget on this section, from which the above is mainly extracted; also Ulp. Frag. tit. xxiv. sec. 12. l. 3 pr. Dig. de usuf. accres. (7. 2.) l. 84. sec. 12. l. 16. Dig. de leg. 1. (30.). Pothier Pand. tit. 1. lib. xxx. 423. Gai. ii. secs. 199 and 223. l. 7. Cod. de leg. (6. 46.). Vat. Frag. 85. 87.

200. Illud quæritur, quod sub condicione per vindicationem legatum est, pendente condicione cujus esset. Nostri præceptores heredis esse putant exemplo statu-liberi, id est ejus servi qui testamento sub aliqua condicione liber essejussus est, quem constat interea heredis servum esse. Sed diversæ scholæ auctores putant nullius interim eam rem esse; quod multo magis dicunt de eo quod sine condicione pure legatum est, antequam legatarius admittat legatum.

200. It is also a question, who has the property of a thing bequeathed under a condition by *vindicatio*, whilst the condition is unfulfilled. According to the opinion of our doctors the property is in the heir, after the analogy of the *statu-liber*, that is, of that slave, who in a testament is declared free under a certain condition, and who, it is evident, in the interval is the slave of the heir. But, according to the opinion of the doctors of the opposite school, the property during the interval vests in no one, and this they assert especially of that which is bequeathed simply and without condition before the legatee acknowledges the legacy.

201. Per damnationem hoc modo legamus: HERES MEUS STICHUM SERVUM MEUM DARE DAMNAS ESTO. Sed et si DATO scriptum sit, per damnationem legatum est.

201. We bequeath *per damnationem* in the following manner—"My heir shall be bound to give up my slave, Stichus;" moreover if it be written "he shall give (*dato*)," the bequest is still *per damnationem*.

202. Quo genere legati etiam aliena res legari potest, ita ut heres redimere et præstare aut æstimationem ejus dare debeat.

202. By this kind of bequest, property which belongs to another can be bequeathed, so that the heir must redeem it and fulfil the bequest, or give its equivalent.

203. Ea quoque res quæ in rerum natura non est, si modo futura est, per damnationem legari potest, velat fructus qui in illo fundo nati erunt, aut quod ex illa ancilla natum erit.

204. Quod autem ita legatum est, post aditam hereditatem, etiamsi pure legatum est, non ut per vindicationem legatum continuo legatario acquiritur, sed nihilominus heredis est. Ideo legatarius in personam agere debet, id est intendere heredem sibi dare oportere: et tum heres *rem*, si *mancipi* sit, *mancipio* dare aut in jure cedere possessionemque tradere debet; si nec *mancipi* sit, sufficit si tradiderit. Namsi *mancipi* rem tantum tradiderit, nec *mancipaverit*, *usucapione dumtaxat* pleno jure fit legatarii: *finitur autem usucapio ut supra quoque diximus*, *mobiliū quidem rerum anno*, earum vero quæ solo tenentur, biennio. (d)

203. Also a thing not yet in existence, provided it hereafter comes into existence can be bequeathed *per damnationem*, as for example, fruits which shall spring from a certain estate, or the child that shall be born from a certain female slave.

204. But what is so bequeathed, after entrance upon the inheritance even without a condition, is not acquired forthwith by the legatee as a legacy *per vindicationem*, but the property still remains in the heir. Hence the legatee must bring a personal action, that is, maintain that the heir ought to give the thing to him, and then the heir, if the thing be a *res Mancipi*, must give it by *mancipium*, or cede it *in jure* and deliver the possession; if it be a *res nec Mancipi* mere tradition will suffice; but if he has merely delivered a *res Mancipi* and not *mancipated* it, then only by *usucapio* does it become the property of the legatee by full legal title; now *usucapio* is completed as we have said above, for moveables in the space of a year, but for those things which pertain to the soil in the space of two years.

(d) The reforms introduced by the Emperor Justinian altered the law here expounded by Gaius. As already observed, the "quattuor genera legatorum" ceased, and there were only two kinds of legacies. (See note to sec. 194.) The distinction also between "*res Mancipi*" and "*res nec Mancipi*" was abolished.

205. Est et alia differentia inter legatum *per vindicationem* et *per damnationem*: si enim eadem res duobus pluribusve per damnationem legata sit, si quidem conjunctim,

205. There is also another distinction between a legacy *per vindicationem* and *per damnationem*; for if the same thing is bequeathed to two or more persons *per damnationem* and

plane singulis partes debentur *sicut in per vindicationem legato*. Si vero disjunctim, singulis solida res debetur, ut scilicet heres alteri rem, alteri æstimationem ejus præstare debeat. Et in conjunctis deficientis portio non ad collegatarium pertinet, sed in hereditate remanet. (e)

it is bequeathed conjunctively; doubtless an equal share is due to each, as in a legacy *per vindicationem*. But if on the other hand it is bequeathed disjunctively, the entire object is due to each, so that the heir must give the thing to one of the parties, and the value of it to the other. Also in the case of a bequest made conjunctively the portion of a party who fails to prove his title, does not accrue to the joint tenant, but remains in the inheritance.

(e) This section is emended from the conjecture of Euler, which follows partly the MS. and partly the Epitome. The latter reads as follows: "Est et inter legatum vindicationis et damnationis ista similitudo, quod per legatum vindicationis et damnationis, sive conjunctim, id est duobus aut pluribus una res in legato dimissa fuerit omnibus, in utroque legato simul ab omnibus præsumatur. Inter legatum vindicationis et damnationis illa differentia est, ut si disjunctim, id est singulis quæcumque res relicta fuerit, singulis integra debeatur, id est ut unus ipsam rem accipiat, alii æstimationem rei ipsius in pretio ab herede accipiat. After examining the marks visible in the MS. Huschke reads "Est et illud *discrimen* per vindicationem et per damnationem legati, quod si eadem res, etc." In his edition of Gaius, published subsequently to his Kritik, he has the reading, "Est et illud *dissimile* per, etc." Kritik, p. 48. Gaius, p. 178.

206. Quod autem diximus deficientis portionem *in per damnationem* quidem legato in hereditate retineri, *in per vindicationem* vero collegatario accrescere, admonendū sumus ante legem Papiam jure civili ita fuisse: post legem vero Papiam deficientis portio caduca fit et ad eos pertinet qui in eo testamento liberos habent.

206. Now as to what we have said that in a legacy *per damnationem* the share of any one who fails will be retained in the inheritance, but in the case of a legacy *per vindicationem* it accrues to the joint tenant, we must observe that this was so *jure civili* before the lex Papia; after the lex Papia, on the other hand, the share of the party who fails to establish his claim becomes a *res caduca*, and falls to those taking under that testament who have children.

207. Et quamvis prima causa sit in caducis vindicandis heredum liberos habentium, deinde, si heredes liberos non habeant, legatariorum liberos habentium, tamen ipsa lege Papia significatur, ut collegatarius conjunctus, si liberos habeat, potior sit heredibus, etiamsi liberos habent.

207. And although the first claim by *vindicatio* on things which have become *caduca*, belongs to those of the heirs who have children, and secondly if the heirs have no children, to the legatees who have children; yet by the same *lex Papia* it is appointed, that a co-legatee who has been joined in the legacy with the party failing will, if he has children, have a stronger claim than the heirs, even if they have children.

208. Sed plerisque placuit, quantum ad hoc jus quod lege Papia conjunctis constituitur, (f) nihil interesse utrum per vindicationem an per damnationem legatum sit.

208. But most are of opinion, that with reference to the right, which is established by the *lex Papia* for those who are conjoined in a bequest, it makes no difference whether the legacy is *per vindicationem* or *per damnationem*.

(f) The law here referred to is the *lex Papia Poppæa* generally cited in combination with the *lex Julia*, passed in the year of Rome 755. The *lex Papia* was enacted in the year of Rome 762. These laws were deemed necessary in order to favour marriage and to augment the depopulated empire. One of the principal provisions of the *lex Papia* was to declare that celibates should be incapable of receiving by testament, unless in the case of near relations. Married men also *without children* could only take one-half of the legacies left to them. By another enactment of the *lex Papia*, the rights of the legatees were delayed, and determined from their qualifications on the day of opening the will. The *Latini Juniani* were equally incapable of profiting from the liberality of the testator. If however a celibate married within a hundred days from the commencement of the succession, and if also the *Latini Juniani* became Roman citizens within the same period, their incapacity ceased, and they could claim their legacies. Ulp. Frag. tit. xviii. s. 1. See also note, book i. sec. 178.

209. Sinendi modo ita legamus:
HERES MEUS DAMNAS ESTO SINERE LUCIUM TITIUM HOMINEM STICHUM SUMERE SIBIQUE HABERE.

209. We bequeath "permissively" (*sinendi modo*), thus: "My heir shall be condemned to permit Lucius Titius to take and have for himself the slave, Stichus."

210. Quod genus legati plus quidem habet *quam* per vindicationem legatum, minus autem quam per damnationem. Nam eo modo non solum suam rem testator utiliter legare potest, sed etiam heredis sui: cum alioquin per vindicationem nisi suam rem legare non potest; per damnationem autem cujuslibet extranei rem legare potest.

210. This kind of legacy is more extended than the legacy *per vindicationem*, but less so than that *per damnationem*; for in this manner the testator can bequeath not only his own property validly, but also even that of his heir, whilst on the contrary he can *per vindicationem* only bequeath that which belongs to himself; but he can *per damnationem* bequeath the property of any extraneous.

211. Sed si quidem mortis testatoris tempore res ipsius testatoris sit vel heredis, plane utile legatum est, etiamsi testamenti faciundi tempore neutrius fuerit.

211. And if at the time of the testator's death the property belonged to the testator, or to his heir, there is no doubt that the legacy is valid, even though at the time of making the testament the property belonged to neither.

212. Quod si post mortem testatoris ea res heredis esse cœperit, quaeritur an utile sit legatum. Et plerique putant inutile esse: quid ergo est? Licet aliquis eam rem legaverit quæ neque ejus umquam fuerit, neque postea heredis ejus umquam esse cœperit, ex senatus-consulto Neroniano (*g*) proinde videtur ac si per damnationem relicta esset.

212. But if the property has come into the possession of the heir after the death of the testator, it is a question whether the legacy is valid: most think that it is invalid. What therefore is the result? If any one has bequeathed a thing which has never been his, nor has subsequently become the property of the heir, it appears that in virtue of the senatus-consultum Neronianum, it is bequeathed as if *per damnationem*.

(*g*) When this senatus-consultum was passed is not known for certain. Doménget says it was "vers l'an 807 de Rome, ou plus tard en l'an 821.;" Hermann agrees with him. Before the passing of this law, if a testator had left a legacy in a certain mode as "*per Vindicationem*," and the

thing devised did not belong to him as Quiritarian owner, the bequest was absolutely void. The senatus-consultum Neronianum provided that whenever a legacy was invalid from the form in which it had been left, this should not render the devise void. If, for example, a legacy had been left "per vindicationem," and the legatee could not take in this form for the reasons already stated, then he was empowered by the senatus-consultum to take "per damnationem." Ulpianus says "Si ea res, quæ non fuit utroque tempore testatoris ex jure Quiritium, per vindicationem legata sit, licet jure civili non valeat legatum, tamen senatus-consulto Neroniano confirmatur; quo cautum est, ut quod minus rectis (aptis) verbis legatum est, perinde sit ac si optimo jure (sc. per damnationem) legatum esset." Frag. xxiv. 11. Gai. ii. 197. 218. 220. 222. Vat. Frag. 85. After the time of Constantine the rigour by which legacies had been controlled was considerably relaxed, and henceforth there was no necessity to observe the *verba concepta* of the strict law. All that was required was that the legacy should be left in words which fitly and fully expressed the intention of the testator. If this were done the legacy was held to be valid. Still, what has been denominated the "quattuor genera legatorum" were not confounded, but the testament and formal words of the strict law were allowed to be dispensed with. l. 21. Cod. de test. (6. 23.) This change prepared the way for the further alterations made by the Emperor Justinian. He abolished the "quattuor genera legatorum," reducing them to two kinds. Nor was the mode in which the testator expressed his intentions regarded as any longer of importance. One kind of legacy gave right of property and entitled the legatee to an *actio in rem*; the other kind gave rise to an obligation, and enabled the legatee to employ an *actio in personam*. Suppose, for example, a man bequeathed a *fundus* which belonged to him, and instead of using the "per vindicationem" he employed the form of legacy known as "per damnationem." In such a case, after the change which Justinian made in the law, it was held that

the formal words were of no importance, and that although the testator had used the form "*per damnationem*," still the legatee was entitled to the benefit of the *Vindicatio*. The land passed *recta via*, as it was expressed, to the legatee. If the property left did not belong to the testator, the legatee could avail himself of an action based upon the obligation. The constitution in which the change made by Justinian was enacted will be found ll. 1. 2. Cod. com. de leg. et fid. et de in rem. mis. tol. (43. 1.)

213. Sicut autem per damnationem legata res non statim post aditam hereditatem legatarii efficitur, sed manet heredis eo usque, donec is heres tradendo vel mancipando vel in jure cedendo legatarii eam fecerit; ita et in sinendi modo legato juris est: et ideo hujus quoque legati nomine in personam actio est QUIDQUID HEREDEM EX TESTAMENTO DARE FACERE OPORTET.

214. Sunt tamen qui putant ex hoc legato non videri obligatum heredem, ut mancipet aut in jure cedat aut tradat, sed sufficere, ut legatarium rem sumere patiatur; quia nihil ultra ei testator imperavit, quam ut sinat, id est patiatur legatarium rem sibi habere.

215. Major illa dissensio in hoc legato intervenit, si eandem rem duobus pluribusve disjunctim legasti: (*h*) quidam putant utrisque solidum de-

213. Now as property bequeathed *per damnationem* does not belong to the legatee immediately after the entrance upon the inheritance, but continues to belong to the heir until he shall have conveyed it to the legatee, either by tradition, by mancipation or by the *in jure cessio*, so the same rule prevails when a legacy is given permissively (*sinendo modo*); and therefore for this kind of legacy there is a purely personal action for claiming "all that which the heir on the ground of the testament ought to give or to do."

214. There are however some jurists who think that the heir is not bound by such a legacy either to mancipate, to cede by the *in jure cessio*, or to give by tradition; but that it suffices if he suffer the legatee to take the thing, since the testator has enjoined on him nothing beyond this, "that he permit," that is, suffer the legatee to have the thing for himself.

215. There is a greater difference of opinion in respect to this legacy; if the same thing is devised to two or more persons disjunctively,

beri, sicut per *damnationem*: nonnulli occupantis esse meliorem conditionem aestimant, quia cum in eo genere legati damnetur heres patientiam præstare, ut legatarius rem habeat, sequitur, ut si priori patientiam præstiterit, et is rem sumpserit, securus sit adversus eum qui postea legatum petierit, quia neque habet rem, ut patiat eam ab eo sumi, neque dolo malo fecit quominus eam rem haberet.

some jurists are of opinion that the whole thing (*in solidum*) is due to each, as in a legacy *per damnationem*; others consider that the condition of the legatee in possession is the better, because as in this kind of legacy the heir is held bound to permit the legatee to have the thing without opposition, it follows, that if he has not made any opposition to the first claimant, who has taken possession of the thing, the heir is secure against any one who afterwards demands the legacy, since the thing is no longer in his power, so that he can suffer it to be taken by the claimant; nor has he acted fraudulently (*dolo malo*) in not retaining possession of the thing.

(h) Lachmann has the reading *elegasti*, which he has derived from Petronius, c. 43. Boecking does not accept this emendation, but reads *legasti*. Huschke objects to this reading, and says that you will hardly find an example of such a use of *legasti* in the classical jurists. Gaius always uses the expressions “quod quisque (aliquis) *legaverit*,” or “quod *legatum* est.” Huschke is of opinion that the reading was originally *e legata*, which became corrupted into *elegasti*, and that this naturally led the transcriber to the reading *eandem rem* at the beginning of the sentence. He proposes to read as follows: “Si eadem res duobus pluribusve disjunctim est legata.” Compare Gai. ii. 195, 199, 200, 205, 218, 219, 223. Huschke also thinks that the better punctuation is to place a colon after “*intervenit*.”

216. Per præceptionem hoc modo legamus: LUCIUS TITUS HOMINEM STICHUM PRÆCIPITO.

216. A legacy is given *per præceptionem* in the following way. “Lucius Titius shall take my slave Stichus as a special legacy”—(i. e., before the distribution).

217. Sed nostri quidem præceptores nulli alii eo modo legari posse putant, nisi ei qui aliqua ex parte heres scriptus esset: præcipere enim esse præcipuum sumere; quod tantum in ejus personam procedit qui aliqua ex parte heres institutus est, quod is extra portionem hereditatis præcipuum legatum habiturus sit.

218. Ideoque si extraneo legatum fuerit, inutile est legatum, adeo ut Sabinus existimaverit ne quidem ex *senatusconsulto* Neroniano posse convalescere: nam eo, inquit, *senatusconsulto* ea tantum confirmantur quæ verborum vitio jure civili non valent, non quæ propter ipsam personam legatarii non deberentur. Sed Juliano ex Sexto (i) placuit etiam hoc casu ex *senatusconsulto* confirmari legatum: nam ex verbis etiam hoc casu accidere, ut jure civili inutile sit legatum, inde manifestum esse: quod eidem aliis verbis recte legatur, velut *per vindicationem* et *per damnationem*, sinendi modo: tunc autem vitio personæ legatum non valere, cum ei legatum sit cui nullo modo legari possit, velut peregrino cum quo testamenti factio non sit; quo plane casu *senatusconsulto* locus non est.

217. But our doctors are of opinion that a bequest can be made in this way to no other person than to him who is instituted heir for a certain part: for *præcipere* is to take as a special legacy before distribution, (*præ capere*) and this can affect only one who is instituted heir to a certain part, so that he may acquire this first legacy beyond his portion of the inheritance.

218. Therefore if such a legacy is left to an *extraneus* it is ineffectual, so much so that as, Sabinus thought, it could not become valid even by the *senatus-consultum* Neronianum; for he says, by that *senatus-consultum* only those legacies are confirmed which are rendered invalid by the civil law (*jus civile*) through some error in the form of words, not those which lapse on account of something connected with the legatee himself (*propter personam*). But according to the opinion of Julianus in the Sixth (book of his Digest,) even in this case the legacy is confirmed by the *senatus-consultum*, for in this instance it follows from the words used that the devise is ineffectual by the *jus civile*; and hence it is clear that a legacy left to the same person in other words than *sinendo modo*, such, for example, as *per vindicationem* or *per damnationem*, would be valid. But a legacy is invalid from defect in the person of the legatee when it has been made to one who can under no circumstances receive a legacy, as for example, to a Perigrinus with whom no *testamenti factio* exists, in which case it is clear the *senatus-consultum* is inapplicable.

(i) There is a reading "Juliano et Sexto." Savigny is of opinion that by "Sextus" we are to understand Pomponius, who is here designated simply by his prænomen. Domenget speaks quite confidently in favour of this opinion. He says, "Gaius vent sans doute designer Sextus Pomponius, qui a annoté l'édit du jurisconsulte Julien, (edictum perpetuum)." Goeschen, however, a far higher authority, does not take the view just presented. He says, "Num Pomponium Sexti prænominē Gaius significare voluerit, dubitari potest." Lachmann quotes similar forms of expression; for example, "Neratius libris ex Plautio ait:" and from the Vaticana Fragmenta "Pomponius libro vii. ex Plautio." Boecking says, "Mihi Juliano libro sexto (Digestorum) legendum esse videtur, quem huc pertinentem Juliani librum permultis locis similiter landat Ulpianus." Boecking's Gaius, p. 143, note 1. Vat. Frag. secs. 75, 88. Domenget in loco, p. 252. Instituzioni di Gajus, vol. i. p. 193.

219. Item nostri præceptores quod ita legatum est nulla ratione putant posse consequi eum cui ita fuerit legatum, *præterquam* iudicio familiæ eriscundæ quod inter heredes de hereditate eriscunda, id est dividenda accipi solet: officio enim iudicis id contineri, ut et quod per præceptionem legatum est adjudicetur.

219. Again, our teachers are of opinion that a legacy of this kind can be secured in no other manner by the party entitled to receive it than through the *iudicium familiæ eriscundæ*, which is usually employed between the co-heirs, for the division of the inheritance which has devolved upon them. For it belongs to the office of the judge to make the adjudication of that which has been bequeathed *per præceptionem*.

220. Unde intellegimus nihil aliud secundum nostrorum præceptorum opinionem per præceptionem legari posse, nisi quod testatoris sit: nulla enim alia res quam hereditaria deducitur in hoc iudicium. Itaque si non suam rem eo modo testator lega-

220. Thus we understand, according to the opinion of the masters of our school, that nothing else can be bequeathed *per præceptionem*, except that which is the property of the testator; for no other things than those pertaining to the inheritance

verit, jure quidem civili inutile erit legatum; sed ex senatusconsulto confirmabitur. Aliquo tamen casu etiam alienam rem *per* præceptionem legari posse fatentur: veluti si quis eam rem legaverit quam creditori *fiduciæ* causa mancipio dederit; nam officio judicis coheredes cogi posse existimant soluta pecunia (*j*) solvere eam rem, ut possit præcipere (*k*) is cui ita legatum sit.

can be the subject of this legal proceeding. Therefore if the testator has bequeathed in this manner property not his own, the legacy will be invalid according to the civil law (*jus civile*), but it will be confirmed by virtue of the senatus-consultum. Still, however, in one case the property of another person may be devised by means of the *per præceptionem*, as for example, if any one has given as a legacy a thing which he has mancipated to his creditors by way of trust (*fiduciæ causa*); for it is thought that the co-heirs could be compelled by means of the *officium judicis*, to redeem that thing after the payment of the debt, so that he to whom it has been bequeathed may be able to take it beforehand (*præcipere*).

(*j*) *Soluta pecunia.* The payment of the money for which the thing had been given in pledge *fiduciæ causa* is here referred to.

(*k*) The word *præcipere* means to take before another person—to anticipate; and it is frequently employed in this sense in Roman law. It is used in this passage to express the obtaining of the legacy before the general distribution of the inheritance. In this sense Papinianus uses the word; “Quum unus,” says he, “exheredibus certam pecuniam præcipere jussus esset.” l. 10. Dig. de alimen., etc. (34. 1.) The Sabinians were of opinion that a legacy could only be left in this manner to one who was also instituted heir, but by the senatus-consultum Neronianum the legacy was made valid even when left to an extraneous, provided the legatee were one to whom the legacy might have been left in any of the three other modes. See note on ii. 212, and Hermann’s Handlexicon, for examples of the use of the word “*præcipere*,” sub voce.

221. Sed diversæ scholæ auctores putant etiam extraneo per præceptionem legari posse proinde ac si ita scribatur: TITIUS HOMINEM STICHUM CAPITO, supervacuo adjecta PRÆ syllaba; ideoque per *vindicationem eam rem* legatam videri. Quæ sententia dicitur divi Hadriani constitutione confirmata esse.

222. Secundum hanc igitur opinionem, si ea res *ex jure* Quiritium defuncti fuerit, potest a legatario vindicari, sive is unus ex heredibus sit sive extraneus: et si in bonis tantum testatoris fuerit, extraneo quidem ex senatusconsulto utile erit legatum, heredi vero familiæ *erciscundæ* iudicis officio præstabitur. Quod si nullo jure—fuerit testatoris, (l) tam heredi quam extraneo ex senatusconsulto utile erit.

(l) Property was said to be *nullo jure* when the testator was neither entitled to it by the *jus Quiritium*, nor by the *jus gentium*.

223. Sive tamen heredibus, secundum nostrorum opinionem, sive etiam extraneis, secundum illorum opinionem, duobus pluribusve eadem res conjunctim aut disjunctim (m) legata fuerit, singuli partes habere debent.

221. But according to the opinions of the writers of the opposite school, a legacy may be left *per præceptionem* even to a stranger (*extraneus*), just as if it were written, "Titius shall take (*capito*) the slave Stichus," the syllable *præ* being added superfluously; and hence the legacy seems to be devised *per vindicationem*; an opinion which is said to be confirmed by a constitution of Hadrian.

222. Therefore, according to this opinion, if the thing devised belonged to the deceased by Quiritarian law, the legatee could sue for it by the *vindicatio*, and that whether he were one of the heirs or an *extraneus*, and if the thing were only in the bonitarian ownership (*in bonis*) of the testator, the legacy would be valid as to the extraneus by virtue of the *senatus-consultum*; on the other hand, it will be assigned to the heir by means of the *actio familiæ erciscundæ*. But if it were the property of the testator, neither by the one species of ownership nor the other (*nullo jure*); the legacy would be equally valid by virtue of the *senatus-consultum*, as well for the heir as for the extraneus.

223. If the same thing has been devised to two or more persons conjunctively or disjunctively, whether to heirs according to our opinion, or to *extranei* according to the doctors of the opposite school, each ought to have his share of the thing.

(m) “Si aut conjunctim, id est multis, aut disjunctim singulis relinquatur, omnibus una res tantum quæ nominata est debetur; non uni res et alii æstimatio, sicut in legato damnationis est constitutum.” Epit. ii. 5. s. 7.

AD LEGEM FALCIDIAM.

224. Sed olim quidem licebat totum patrimonium legatis atque libertatibus erogare, nec quicquam heredi relinquere præterquam inane nomen heredis; idque lex XII tabularum permittere videbatur, qua cavetur, ut quod quisque de re sua testatus esset, id ratum haberetur, his verbis: UTI LEGASSIT SUE REI, ITA JUS ESTO. Quare qui scripti heredes erant, ab hereditate se abstinebant; et idcirco plerique intestati moriebantur.

OF THE FALCIDIAN LAW.

224. Formerly, indeed, a testator could bequeath his whole patrimony in legacies and enfranchisements, and leave nothing to the heirs save the empty name of heir; and the law of the Twelve Tables seemed to permit this result, by providing that whatever disposition any testator made respecting his property should be valid in accordance with the formula—“As each person has made bequests touching his property, that shall be law.” Wherefore those who were appointed heirs, frequently abstained from the inheritance, and on that account very many persons died intestate.

225. Itaque lata est lex Furia, qua, exceptis personis quibusdam, ceteris plus mille assibus legatorum nomine mortis causa capere permissum non est. Sed et hæc lex non perfecit quod voluit. Qui enim verbi gratia quinque milium æris patrimonium habebat, poterat quinque hominibus singulis millenos asses legando totum patrimonium erogare.

225. The *lex Furia* was consequently passed, by the provisions of which no persons (with certain exceptions) were permitted to receive more than ten thousand asses as a legacy, or as a gift on account of approaching death. But even this law did not obtain the object aimed at; for example, he who had five thousand asses as his patrimony, could, by leaving a thousand asses as a legacy to each of five persons, dispose of the whole of his property.

226. Ideo postea lata est lex Voconia, qua cautum est, ne cui plus legatorum nomine mortis causa capere liceret quam heredes caperent. Ex qua lege plane quidem aliquid utique heredes habere videbantur; sed tamen fere vitium simile nasce-

226. Therefore, subsequently, the *lex Voconia* was passed, by which it was provided that no one should acquire under the name of legacies or donations *mortis causa*, more than the heirs acquired. By this law the heirs certainly appear to receive

batur: nam in multas legatariorum personas distributo patrimonio poterant adeo heredi minimum relinquere, ut non expediret heredi hujus lucri gratia totius hereditatis onera sustinere.

227. Lata est itaque lex Falcidia, qua cautum est, (n) ne plus ei legare liceat quam dodrantem. Itaque necesse est, ut heres quartam partem hereditatis habeat. Et hoc *nunc* juro utimur.

something in every case; but yet a similar defect presented itself; for by the distribution of his property to a great number of legatees, a testator could leave so very small an amount to an heir, that the heir would not be willing, for so small a benefit, to undertake the burdens of the entire inheritance.

227. Therefore the *lex Falcidia* was passed, by which it was provided that a testator should not be permitted to bequeath in legacies more than three-fourths of his inheritance; and it is thus a necessary consequence that the heir receives at least a fourth part of the inheritance; and this is the present law.

(n) In the ancient times of Rome there was no limit to the amount that a testator might leave in the shape of legacies except that fixed by his free will. This was found to be as injurious to the heir as to the legatee; since, when the heir declined to enter upon the inheritance on account of its being exhausted by legacies, the entire testament became invalid. The law of the Twelve Tables said “uti legassit super pecunia tutelave suæ rei ita jus esto.” Thus, under the old law, the heir had simply to pay the legacies to the extent of the inheritance, which at times would exhaust the entire estate. If the heir disclaimed, the legacies failed. This was of course a great loss to the legatee, but under these circumstances there was possibly at times an arrangement made between the heir and the legatees, the latter undertaking to protect the former from loss, upon his consenting to enter upon the inheritance. By the *lex Furia testamentaria*, not the *lex Furia* (sive *Fusia*) *Caninia*, already referred to by Gaius, i. 42, 45, the reception of a legacy over 100,000 asses was rendered illegal, and a four-fold penalty was inflicted upon the person accepting it. Ulpianus says, . . . “*lex Furia*

testamentaria, quæ plus quam mille assium legatum mortisve causa prohibet capere præter exceptas personas, et adversus eum, qui plus ceperit, quadrupli pœnam constituit." Ulp. tit. i. sec. 2. xxviii. sec. 7. Gai. iii. 225. At a later period the amount seems to have been increased from 100,000 asses to 100,000 sesterces. The sum of 100,000 asses was, if we are to trust Livius and Dionysius, the amount at which the citizens belonging to the first class were assessed in the Census. See Instit. Rom. Law, pp. 21, 22. Nor could a woman be instituted for a part of the inheritance, as by the non-entrance of the other heir or heirs, she might by the *jus accrescendi* become entitled to the entire property. Walter's *Rechtsgeschichte*, p. 251.

The lex Furia was the first enactment on the subject, and it appears to have been passed in 571, A.U.C. This law proving ineffectual, it was repealed by the lex Voconia—a Plebiscitum, proposed by Q. Voconius Saxa, tribune of the plebs, and passed in the year 585, A.U.C. (169 B.C.)—which enacted that no person should take by way of legacy or *donatio mortis causa* more than the heirs *unitedly*: or in other words, that the amount bequeathed to any *one* person should not exceed the balance of the inheritance accruing to the heir or heirs as a body. It also affected the competency of women to inherit *ex asse*, i. e., to take the whole estate of a defunctus, by declaring that no woman should be instituted heir to a person, "qui centum millia æris census est." Gai. ii. 274. See also Paulus R. S. iv. 8. sec. 22. Neither Mr. Long nor Mr. Sandars seems to be quite clear in the apprehension of this law. The former able writer says that "no person should take by way of legacy, etc., more than the heredes (severally, *as it seems*).” Mr. Sandars quoting Gaius ii. 226, says, "no legatee was to have more than each heir had." Ins. Jus. p. 344. This certainly does not express the meaning of Gaius. Cicero says, "qui morte testamentove tantundem capiat, quantum *omnes heredes*;" de Leg. ii. 19. See Rudorff. Jahrb. fur wissenschaftliche Kritik. 1844. Num. 58. A. Gell. 7. 13. Thus by the increase of

legatees, whilst each one might not have more than any sole heir, this part might be so small as not to make it worth while for the heir to assume the responsibilities and liabilities of the inheritance. Warnkoenig says, “ex qua lege plane quidem aliquid habere hereditas videbantur; sed tamen fere vitium simile nascebatur: nam in multas legatariorum personas distributo patrimonio, poterat adeo heredi minimum relinquere testator, ut non expediret heredi, hujus lucri gratia totius hereditatis onere sustinere.” *Juris. Rom. Priv. lib. ii. pars. ii. tit. vi. p. 206.* Scheurl. *Instit. sec. 208, p. 385.* Cicero says, “Quid? ei plus legarit, quam ad heredem heredesve perveniat, quod per legem Voconiam ei, qui census non sit, licet.” in *Verr. ii. l. 43.* Also, if there were several heirs, one legacy might amount to half the property of the testator, but could never exceed it. Again, each of the several legatees could not individually take more than the heir or heirs, or as Cicero says, in the passage already cited, than the *omnes heredes*. A sum given to a legatee was, as the same writer expresses it, “pecunia non minor esse facta, quam *heredibus omnibus* esset relicta.” *De leg. cit.* It is clear that if the testator limited the amount given to any heir, or to the heirs taken conjointly, to the value of the bequest given to the legatee or to each of the legatees, one heir could not acquire more than half the estate, and might obviously get a great deal less in two ways: either by the multiplication of the heredes, or by increasing the number of the legatees, giving to each of the latter a portion of the estate equal to that given to the heir, or the heirs taken as a class, the latter being entitled only to a single portion. Whether there was but one heir or several heirs, appears to have made no difference in this respect, that it sufficed to leave them, as a class, a portion not less than that taken by any *one* legatee. The Falcidian law seems to have recognised the same principle, for it made no difference “sive unus heres institutus esset, sive plures, apud eum eoque pars quarta remanerit.” *Instit. pr. de lege Falcid. (2. 22).*

Walter, in his "Rechtsgeschichte," thinks that the passage in Gaius is irreconcilable with what Cicero says, and that, as the law was antiquated at the time of the great institutional writer, he must have misinterpreted the law. Such a view however seems to be incredible, and with the above explanation is inadmissible. See Walter's Rechtsgesch. sec. 641. p. 292. vol. 2.

In 714 A.U.C., and in the reign of the Emperor Augustus, the Falcidian law was passed. The effect of this enactment was to repeal both the *lex Furia* and the *lex Voconia*. By the *lex Falcidia*, which was a *plebiscitum* introduced by P. Falcidius, a tribune of the plebs, it was enacted that the testator should not devise to the legatees more than three-fourths of the inheritance, so that one quarter of the estate remained to the heir or heirs. This law, as we shall see, was subsequently extended by means of the *senatus-consultum Pegasianum* to *fideicommissa*, or what we should now term "testamentary trusts." The *lex Falcidia* speaks of the inheritance in general terms; but subsequently it was held by interpretation that the "*quarta Falcidia*" as it is denominated, should be subtracted from the portion of every legatee. It was, however, at first, only the *direct heirs* who had an undoubted right to detain the *quarta*; this right was afterwards extended to the *heredes*, entitled in the case of intestacy. ll. 18. 77. Dig. ad leg. Fal. (35. 2.) Instit. sec. 1. 1. t. (2. 22).

A simple instance will explain how the *quarta* given by this law was adjusted. Suppose that the testator had said "A shall be my heir; A shall pay X 4000; X shall pay Z 400." Suppose the whole estate to be worth 4000. Then the heir paid X, not 4000, for he was entitled to his *quarta*, but 3000; and X paid only 300 to Z. 1. 32. s. 4. tit. cit. (35. 2.) See also 1. 1. s. 19. ad S. C. Treb. (36. 1.)

The limited space allotted to this note will not allow of more than a glance at a most important subject, namely, the mode in which the Falcidian *quarta* was calculated. The fundamental principle was the following :—The moment when

the testator died, was the time at which the quarta was to be calculated. Whatever increase or decrease there might have been in the value of the estate after that event did not affect the calculation of the quarta in the least degree. This was the basis of the whole doctrine. For example, the estate at the moment of the testator's death is valued at 4000. A is "heres ex asse" and he is bound to pay 3000 to X as legatee. Subsequently, suppose the dwelling-house of the estate worth 1000 to be burned down. The heir is still bound to pay 3000 to X the legatee, although he as heir may get nothing. On the other hand A is "heres ex asse" and the estate is worth 4000. The testator has said that he shall pay 4000 to the legatee. But the heir has a right to his quarta, and hence the legatee has only a claim for 3000. Again, suppose that before the legatee is paid there is an abundant harvest, and that the estate which was only worth 4000 at the moment of the testator's death, has before the entrance of the heir become worth 6000. The heir is still entitled to retain his quarta and the legatee would only receive 3000. The heir would take 1000 as his quarta and 2000 as the increase which accrued after the moment of the testator's death.

228. In libertatibus quoque dan-
dis nimiam licentiam compescuit lex
Furia Caninio, sicut in primo com-
mentario rettulimus.

228. The lex *Furia Caninia*, as we
have observed in our first commentary,
has restrained the too great license in
respect to granting enfranchisements.

DE INUTILITER RELICTIS LEGATIS.

229. Ante heredis institutionem
inutiliter legatur, scilicet quia testa-
menta vim ex institutione heredis
accipiunt, et ob id velut caput et
fundamentum intellegitur totius tes-
tamenti heredis institutio. (o)

CONCERNING LEGACIES INEFFECTUALLY BEQUEATHED.

229. A legacy placed before the
institution of the heir is void ;
because testaments derive their effi-
cacy from such institution, and on that
account the institution of the heir is
understood to be the head and founda-
tion of the whole testament.

(*c*) In the reign of Justinian this strictness as to order was abolished, and legacies left afterwards were held to be valid if they were inscribed "*ante heredis institutionem.*" The law was the same when Ulpianus wrote as in the time of Gaius. He says, "*Ante heredis institutionem legari non potest quoniam vis et potestas testamenti ab heredis institutione inceptit.*" Tit. xxiv. s. 15. Instit. s. 34. de legatis (2. 20).

230. *Pari ratione nec libertas ante heredis institutionem dari potest.*

230. For the same reason, no freedom would be granted before the institution of the heir.

231. *Nostri præceptores nec tutorem eo loco dari posse existimant: sed Labeo et Proculus tutorem posse dari, quod nihil ex hereditate erogatur tutoris datione.*

231. According to the opinion of the doctors of our school, a tutor cannot be appointed in that part of the will; but Labeo and Proculus think that a tutor can be so given, as by the appointment of a tutor nothing is bequeathed away from the inheritance.

232. *Post mortem quoque heredis inutiliter legatur; id est hoc modo: CUM HERES MEUS MORTUUS ERIT, DO LEGO, aut DATO. Ita autem recte legatur: CUM HERES MORIETUR: quia non post mortem heredis relinquitur, sed ultimo vitæ ejus tempore. Rursum ita non potest legari: PRIDIÆ QUAM HERES MEUS MORIEIUR. Quod non pretiosa ratione receptum videtur. (p)*

232. Also a bequest after the death of the heir is invalid, that is to say if made in the following manner—"As soon as my heir shall be dead, I give, I bequeath," or "he shall give" (*dato*). But the following is a valid bequest, "when the heir shall die;" because it is not left after the decease of the heir, but at the last moment of his life. Again nothing can be bequeathed thus, "the day before my heir shall die." But this appears to be received from no valid reason.

(*h*) Legacies deferred until after the death of the heir, were invalid, since it was only the heir that could discharge the legacy. Gai. ii. ss. 260. 271. Again, legacies, delayed until the moment of the death of the heir were equally

void. Theophilus says that the moment of death could only be known after death, hence that the disposition made by the testator would always be discharged by the heir of the heir. But this reason would not have weighed with Gaius, as we learn from his remarks at the end of this section. Justinian subsequently confirmed the views contained in the text, both in regard to legacies deferred till after the death, as well as those to take effect at the moment of the death, of the heir or the legatee; and ordained that all kinds of legacies should be regarded as though they had been delayed until the moment of death. Theoph. lib. 2. tit. 20. sec. 25. Ulp. xxiv. 16. xxv. 8.; Inst. sec. 35. de legatis (2. 20).

233. Eadem et de libertatibus dicta intellegemus.

233. We understand the same remarks to apply to grants of freedom.

234. Tutor vero an post mortem heredis dari possit quærentibus eadem forsitan poterit esse quæstio, quæ de eo agitur quæ iante heredum institutionem datur.

234. But to those who enquire whether a tutor can be given, "after the death of the heir," we reply that this question is probably determinable in the same way as that which has been discussed concerning a tutor assigned before the institution of an heir.

DE PÆNÆ CAUSA RELICTIS LEGATIS.

CONCERNING LEGACIES BEQUEATHED BY WAY OF PENALTY.

235. Pænæ quoque nomine inutiliter legatur. Pænæ autem nomine legari videtur quod coercendi heredis causa relinquitur, quo magis heres aliquid faciat aut non faciat; velut quod ita legatur: SI HERES MEUS FILIAM SUAM TITIO IN MATRIMONIUM COLLOCAVERIT, X MILIA SEIO DATO; vel ita: SI FILIAM TITIO IN MATRIMONIUM NON COLLOCAVERIS, X MILIA TITIO DATO. Sed et si heres verbi gratia intra biennium monumentum sibi non fecerit, x Titio dari iusserit, pænæ nomine legatum est. Et de nique ex ipsa definitione multas similes species proprias fingere possumus. (q)

235. Also a bequest by way of penalty is invalid. Now that which is left for the sake of coercing the heir, appears to be bequeathed by the way of penalty, in order that the heir may do or not do something; for example, anything bequeathed as follows—"If my heir shall have given his daughter in marriage to Titius, he shall give ten thousand to Seius." Moreover, if a testator directs that ten thousand shall be given to Titius, if his heir does not marry his daughter to Titius, also if for example, he order the sum to be paid to Titius provided the heir has not

within two years raised a monument to him, such a legacy is called penal; in fine, from the very definition of this kind of legacy, we may conjecture many illustrations of a similar nature.

(*q*) Legacies were said to be “*pœnæ causa*” when they were imposed by the testator upon the heir as a punishment. Thus Ulpianus says, “*Pœnæ causa legari non potest. Pœnæ autem causa legatur quod coercendi heredis (causa) relinquitur, ut faciat quid aut non faciat, non ut ad legatarium pertineat, ut puta hoc modo. Si filiam tuam in matrimonium Titio conlocaveris, decem milia Seio dato.*” Tit. xxiv. 17. The motive which led to the prohibition of such legacies was this:—it was felt that the final disposition that a man made of his property should be prompted by feelings of benevolence, and not from anything like resentment or vengeance. Justinian modified the law upon this subject. He ordained that all such legacies should be considered as purely conditional. Yet, if the testator had commanded his heir to do a thing dishonest, impossible, or contrary to law, the legacy was ineffectual, since the heir could not be compelled to transgress the laws, nor to do a thing *contra bonos mores*, or anything impossible. Nor was he to be punished if he did not do such things when ordered. Instit. s. 36 de legatis (2. 20). Domenget, pp. 260, 261.

236. Nec libertas quidem pœnæ nomine dari potest; quamvis de ea re fuerit quæsitum.

236. Even freedom cannot be given penally, although this point has been doubted.

237. De tutore vero nihil possumus quærere, quia non potest datione tutoris heres compelli quidquam facere aut non facere; ideoque nec datur pœnæ nomine tutor; et si datus fuerit, magis sub condicione quam pœnæ nomine datus videbitur.

237. But there can be no question in regard to a tutor, since the heir cannot be constrained by the appointment of a tutor, either to do or not to do anything; and therefore a tutor is not penally appointed; but if a tutor be given in these terms, his appointment will be regarded as made rather under condition than penally.

238. Incertæ personæ legatum inutiliter relinquitur. Incerta autem videtur persona quam per incertam opinionem animo suo testator subicit, *velut si ita legatum sit: QUI PRIMUS AD FUNUS MEUM VENERIT, EI HERES MEUS X MILIA DATO.* Idem juris est, si generaliter omnibus legaverit; *QUICUMQUE AD FUNUS MEUM VENERIT.* In eadem causa est quod ita relinquitur: *QUICUMQUE FILIO MEO IN MATRIMONIUM FILIAM SUAM CONLOCaverit, EI HERES MEUS X MILIA DATO.* Illud quoque in eadem causa est quod ita relinquitur: *QUI POST TESTAMENTUM CONSULES DESIGNATI ERUNT, æque incertis personis legari videtur.* Et denique aliæ multæ hujusmodi species sunt. Sub certa vero demonstratione incertæ personæ recte legatur, *velut: EX COGNATIS MEIS QUI NUNC SUNT QUI PRIMUS AD FUNUS MEUM VENERIT EI X MILIA HERES MEUS DATO.* (r)

238. A bequest made to an uncertain person is invalid. Now a person is regarded as uncertain, of whom the testator had in his mind no definite notion; for example, if the bequest is made thus: "My heir shall give ten thousand sesterces to the person who shall come first to my funeral." The law is the same when a bequest is made to every one generally, "Whoever shall come to my funeral;" in the same category we place such a bequest as follows: "My heir shall give ten thousand sesterces to the person who shall have married his daughter to my son." That legacy also must be included under the same head which is left thus: "Let him give it to those who shall be Consuls elect after the making of my testament." In all these cases the legacy is equally regarded as being made to uncertain persons. There are also many other instances of this nature. But a legacy to an uncertain person is valid when accompanied by a definite description, as in this case; "My heir shall give ten thousand to that one of my cognates now living, who shall be first at my funeral."

(r) The views presented by Gaius were also held by Ulpianus. The latter jurist says, "Incertæ personæ legari non potest; veluti quicumque filio meo filiam suam in matrimonium conlocaverit, et heres meus centum milia dato. Sub certa tamen demonstratione incertæ personæ legari potest velut—Ex cognatis meis qui nunc sunt qui primus ad funus meum venerit, ei heres meus illud dato." Tit. xxiv. sec. 18. Under the emperor Justinian legacies to uncertain persons were made legal. Ins. sec. 95, de legatis. (2. 20).

239. Libertas quoque non videtur incertæ personæ dari posse, quia lex Furia Caninia jubet nominatim servos liberari.

239. Also freedom cannot be given to an uncertain person, because the *lex Furia Caninia* ordains that slaves shall be manumitted by name.

240. Tutor quoque certus dari debet.

240. Also the person appointed as tutor ought to be clearly defined.

241. Postumo quoque alieno inutiliter legatur. *Est autem alienus postumus, qui natus inter suos heredes testatori futurus non est. Ideoque ex emancipato quoque filio conceptus nepos extraneus est postumus avo; item qui in utero est ejus quæ connubio non interveniente ducta est uxor extraneus postumus patri contingit.*

241. A legacy made to an alien postumus is also invalid. Now, an alien postumus is one who at the time of his birth will not be included among the *sui heredes* of the testator. Therefore a grandson begotten by an emancipated son is a postumus stranger to the grandfather; also an unborn child of a married woman with whom the connubium does not exist, is a postumus stranger to the father.

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242. Ac ne heres quidem potest institui postumus alienus: est enim incerta persona. (s)

242. An alien postumus cannot be instituted heir; for he is reckoned with those persons who are uncertain.

(s) A posthumous stranger at the time of Gaius could not be instituted heir, as he was an undefined person (*incerta persona*). In the later law under Justinian a posthumous stranger might be instituted heir. This was in accordance with the prætorian law. Still a posthumous stranger, born of a woman who could not become the wife of the testator, could not be instituted as his heir. Instit. ss. 27, 28. de legatis (2. 20). Domenget p. 264. Instit. pr. de bon. pos. (3. 9.)

243. Cetera vero quæ supra diximus ad legata proprie pertinent; quamquam non inmerito quibusdam placeat pœnæ nomine heredem institui non posse: nihil enim intererit, utrum legatum dare jubeatur heres,

243. But other things which we have said above, apply strictly to legacies; although some think, not without reason, that no heir can be instituted penally; for it will make no difference at all whether the heir

si fecerit aliquid aut non fecerit, an coheres ei adjiciatur quia tam coheredis adjectione quam legati donatione compellitur, ut aliquid contra propositum suum faciat.

244. An ei qui in potestate sit ejus quem heredem instituimus recte legemus, quaeritur. Servius recte legari probat, sed evanescere legatum, si quo tempore dies legatorum cedere solet, adhuc in potestate sit; ideoque sive pure legatum sit et vivo testatore in potestate heredis esse desierit, sive sub condicione et ante condicionem id acciderit, deberi legatum. Sabinus et Cassius sub condicione recte legari, pure non recte, putant: licet enim vivo testatore possit desinere in potestate heredis esse, ideo tamen inutile legatum intellegi oportere, quia quod nullas vires habiturum foret, si statim post testamentum factum decessisset testator, hoc ideo valere quia vitam longius traxerit, absurdum esset. Diversæ scholæ auctores nec sub condicione recte legari putant, quia quos in potestate habemus, eis non magis sub condicione quam pure debere possumus. (t)

JUST. II. 20. 32.

be commanded to give a legacy on condition that something be done, or not done; or a co-heir bejoined with him: because he is as much compelled to do something against his intention by the addition of a co-heir as by the giving of a legacy.

244. It is a question whether we can bequeath legally, to one who is under the *potestas* of the heir whom we have instituted. Servius thinks that the legacy is valid, but that it will lose its validity, if the legatee, at the time when the legacy usually vests, remains still under the *potestas*; therefore if the legacy be without condition, and the legatee cease to be under the *potestas* of the heir during the life of the testator, or if the legacy be conditional, and if before the accomplishment of the condition that event shall have happened, then the legacy becomes due. Sabinus and Cassius think that the conditional legacy is valid, and that an unconditional one is not; for although the legatee shall cease to be under the *potestas* of the heir during the life of the testator, yet still the legacy ought to be considered invalid, because it would be absurd that what would have had no force, if the testator had died immediately after making his testament, should become valid because he has survived for a longer period. The doctors of the opposite school think that even a conditional legacy is invalid; since those whom we have under our *potestas* we can no more place under an obligation conditionally, than we can unconditionally.

(t) A legacy might be given purely and simply; as "I give and bequeath to Seius, my slave Stichus;" or a legacy might

be given under a condition : as for example, "I give and bequeath to Seius, Stichus, if he shall ascend the Capitol." Again, a bequest might be made from a certain point of time, as "I give and bequeath to Seius, my slave Stichus, to take him three years after my death," When the future event was impossible or illegal, the condition was considered as not existing. Instit. sec. 10. de hered. (16. 10).

A legacy was not considered as given from a term, unless the term was fixed and certain : thus, "I give and bequeath to Seius, my house, to hold after the siege of Carthage," was a conditional legacy, which could only take effect if the legatee were living at the time of the happening of the event ll. 1. sec. 2. 79. sec. 1. Dig. de condit. et demonstr. (35. 1.) In the case of a legacy, pure and simple, the right of the legatee commenced from the moment of the death of the testator. l. 1. Dig. quando dies legat. cedat. (36. 2). In regard to the acquisition and payment of legacies, the Romans used two expressions ; they said "*dies legati cedit*" when they wished to denote the arrival of the period for the acquisition : they used the phrase "*dies legati venit*" when they wished to express that the time of payment had arrived. Pending the condition, neither the one nor the other event could happen ; hence the maxim, "*Pendente conditione dies legati nec cedere nec venire potest.*"

Again, with respect to a legacy for a term, the right of the legatee vested (*dies cedebat*) and was transmissible from the day of the decease of the testator. ll. 5. pr. 21. Dig. tit. cit. (36. 2). The rights of the legatee, however, could only be acquired by a person who was qualified at that moment. By the *lex Papia Poppæa*, the vesting of legacies was delayed, when they were pure and simple, until the opening of the testament. Ulp. tit. xxiv. 30. Justinian, however, restored the former rule. l. 1. sec. 1. Cod. de caduc. tol. (6. 51).

With respect to conditional legacies, the right of the legatee did not vest (*dies non cedebat*) until the moment of the happening of the condition ; hence the legatee ought to be

legally qualified to inherit at that moment. The right to the enjoyment of the legacy (*dies venit*) happened as follows: for legacies pure and simple, only after the entrance of the heir; for legacies from a term, upon the arrival of the term; and for conditional legacies, upon the accomplishment of the condition. Modestinus says, “*Omnia, quæ testamentis sine die vel conditione adscribuntur, ex die aditæ hereditatis præstentur.*” l. 32. pr. Dig. de leg. et fid. (2. 31).

What was denominated the rule of Cato exerted a most important influence upon inheritances and legacies. The words of the rule are as follows: “*Quod ab initio vitiosum est, tractu temporis convalescere nequit.*” In other words, that testament which would have been invalid, if the testator had died immediately after he had made it, remained invalid, even though the ground of its invalidity were removed at a later period, occurring during the life time of the testator. This rule, however, was not applicable to conditional legacies, nor to those legacies which vested at the moment of the entrance of the heir upon the inheritance. ll. 3. 5. Dig. de reg. Caton. (34. 7). Domenget pp. 365. 369. Mochler's Pandec. pp. 226. 230.

245. Ex diverso constat ab eo qui in potestate tua est, herede instituto, recte tibi legari: sed si tu per eum heres extiteris, evanescere legatum, quia ipse tibi legatum debere non possis; si vero filius emancipatus aut servus manumissus erit vel in alium translatus, et ipse heres extiterit aut alium fecerit, deberi legatum.

245. On the contrary, it is plain that a legacy can be legally made to you by any one under your *potestas*, if he be instituted your heir: but if you have become heir through him, the legacy lapses, because you cannot owe a legacy to yourself; but if on the other hand, your son should be emancipated, or your slave manumitted, or pass into the property of another, and he himself become heir, or has made another person heir, then the legacy is due.

246. Hinc transeamus ad fideicommissa.

246. Now let us pass to *fideicommissa*.

247. Et prius de hereditatibus videamus.

247. And first as to inheritances.

248. Inprimis igitur sciendum est opus esse, ut aliquis heres recto jure instituat, ejusque fideicommittatur, ut eam hereditatem alii restituat: alioquin inutile est testamentum in quo nemo recto jure heres instituitur. (u)

248. In the first place therefore it is necessary to know that some one should be instituted heir in strict law, and the trust reposed in him, so that he may render up the inheritance to a third person; otherwise a testament is invalid, in which no one is instituted heir in due form of law.

JUST. II. 23. 2.

(u) Gaius, in the text, refers to the institution of the heir, without which the testament was invalid, and consequently the fideicommissum would be ineffectual. But it was also permitted to any person who wished to dispose "per fideicommissum," without making a will, to charge his intestate heirs to surrender the inheritance to a third person; which might be done by means of a codicil. Gai. ii. 270. Dommenget in loco.

249. Verba autem utilia fideicommissorum hæc recte maxime in usu esse videntur: (v) PETO, ROGO, VOLO, FIDEICOMMITTO: quæ proinde firma singula sunt, atque si omnia in unum congesta sint.

249. But these are the operative words of a *fideicommissa* as they appear to be employed validly, and most usually, "I ask," "I pray," "I wish," "I commit to you in trust," and each word is as binding when used singly as when all are combined in one bequest.

(v) The term *fideicommittere*, when analysed, exhibits the fundamental idea contained in the kind of bequest denominated fideicommissum. This word denotes to commit to the faith of any one (*fidei alicujus committere*). The Roman about to depart this life oftentimes entrusted to the fidelity of the heir or of the *legatee*, the fulfilment after death of his last wish. This duty was imposed upon reliable persons by words of solemn entreaty. Hence the definition "Fideicommissum est, quod non civilibus verbis sed *precativè* relinquitur, nec ex rigore juris civilis proficiscitur, sed ex voluntate relinquentis." Again: "Ideo fideicommissa appellata sunt, quia *nullo vinculo juris*, sed tantum pudore eorum, qui rogabantur, continebantur." There were some

words which were held, without doubt, to imply, or rather to impose a testamentary trust of this nature. For example : “*Verba fideicommissorum hæc maxime in usu habentur, peto, rogo, volo, mando, fidei tuæ committo.*” Ulpianus says, “*Etiam hoc modo : cupio des, opto des, credo te daturum fideicommissum est.*” Neratius says, “*Et eo modo relictum ; exigo, desidero, uti des, fideicommissum valet sed et ita ; volo hereditatem meam Titii esse ; scio hereditatem meam restitutum te Titio.*” Not that these were the only words, but they are adduced as examples *maxime in usu*. Ulp. Frag. tit. xxv. s. 1. Instit. s. 1. de fideicom. hered. rel. (2. 23). Instit. s. 3. de sing. reb. per fideicom. (2. 24). l. 12. s. 1. Dig. de injusto rup. etc. (28. 3). ll. 115, 118. Dig. de leg. et fid. l. (30). The cardinal passages in relation to fideicommissa are to be found in Gaius ii. 268 et seq., and in the Fragmenta of Ulpianus, tit. xxv. The student should carefully note the following points. Fideicommissa differed from legacies, inasmuch as by their means a much freer disposition of property might be made, and one requiring no *civil* forms. There is no doubt but that during the period of the Republic, fideicommissa though unknown to the law, were often employed in actual life. The testator would express his wish, leaving it to the honour and to the piety of his heir faithfully to observe his dying request. At this time fideicommissum was not a legal institution, nor could the heir be compelled to carry into effect the wishes of the deceased ; but as a custom such charges often existed in the life of the people. In the time of Augustus, fideicommissa were made compulsory. The emperor, it appears, had been appointed heir to Lucius Lentulus, and complied with the wish of the testator, who had imposed fideicommissa upon his estate. Inst. pr. de codicil. (2. 25). Cic. de fin. ii. 18. From this time fideicommissa became *compulsory* upon the heir as much so as legacies, the only difference being that the strictness which the law required in the case of legacies was not necessary for bequests of this nature.

1. Fideicommissa could be imposed upon the inheritance without the existence of any testament, and even in an intestate codicil. See note to section 289 of this book. A legacy, as we have already seen, could only be left by testament or in a confirmed codicil; and before the time of Theodosius a codicil required no form. No witnesses were required to its validity, but simply the authentic will of the deceased. The strictly formal words of the legacy, which gave rise to such fine distinctions, were dispensed with entirely, and such words as we have already indicated, or any others, sufficed, provided that they were intelligible, to impose a compulsory burden upon the heirs or the legatees. The formal words in which a legacy was left must be in the Roman tongue; but fideicommissa might be in any language provided it clearly expressed the intention of the party; and we find the Greek tongue employed in the Pandects for the creation of fideicommissa.

2. In the case of legacies it will be remembered that only the *direct heir* could be burdened. Fideicommissa could be imposed upon any person, heir or legatee, upon whom the testator had bestowed his favours. Thus a legatee might be burdened with a fideicommissum, as well as the heir who succeeded to the property *in the case of intestacy*. Again, as to the qualifications required by those who might be benefitted by fideicommissa, the greatest latitude was allowed to prevail. A legacy could only be left to a person who had the *testamenti factio passiva*, and the legatee was also required to be *capax*. This rule did not apply to fideicommissa; for if a person had not the *testamenti factio* and if he were *incapax*, it did not incapacitate him from taking per fideicommissum. The law underwent a modification in the time of the Emperor Hadrian, which had the effect of bringing legacies and fideicommissa into much nearer accord. Until the reign of Hadrian a peregrinus was entitled to take by virtue of a fideicommissum; but by the change introduced at that time he could henceforth neither take a fideicommissum nor could he receive a legacy.

In the later law, before a peregrinus could take, the property would escheat to the fiscus. Again, a person who was termed *incerta* could not receive a legacy; hence a *postumus alienus*, for example the son of an emancipated child, was excluded. But such a person was not debarred until the time of Hadrian from receiving a fideicommissum. Nor did the incapacity, to which reference has been so frequently made, under which celibates and childless persons were placed by the *lex Julia et Papia Poppæa*, apply when anything was left to such persons by fideicommissa. A *cœlebs* could not take a legacy, and an *orbis* could only take one-half of the property bequeathed; but they could both accept per fideicommissum. The *senatus-consultum Pegasianum*, passed in the reign of Vespasian, named after the Consules Suffecti, Pegasus, and Pusio, enabled the fiduciarius to receive one-fourth of the hereditas, and the same power was permitted to him in the case of single things. This *senatus-consultum* extended to fideicommissa the principles applicable to legacies, so far as regarded *capacity* to take. It is worthy of observation that fideicommissa passed from the mild and the free principles of the "*jus gentium*" to what may be denominated the exactness and the strictness of the "*jus civile*." Neither the rules of the *lex Junia Norbana* in relation to the incapacity of the *Latini Juniani* nor the limitation of the *lex Voconia* in regard to women taking the inheritance, nor the doctrine applicable to legacies, were ever extended to fideicommissa.

3. As to the objects that might be devised, there was no limitation whatever. All kinds of property might be thus disposed of. All that could be left to an heir or to a third person could be given as fideicommissa. All the freedom and expansion that belonged to a legacy *per damnationem*, appertained to bequests of this nature.

4. In regard to the legal effect of property left in this way, the Roman jurists did not consider that there was any transfer of the dominium and of course there could be no *Vindicatio*. There was, however, held to be an obligatory relationship,

not indeed a civil one, but a natural one between the person who received the property in trust, who was called the “*fideuciarius*,” and the person for whom he received it, who was called the “*fideicommissarius*.” There was a “*cognitio extraordinaria*” created after the time of Augustus for cases of *fideicommissa*, and in the time of Claudius, “*prætores fideicommissarii*” were also appointed. At Rome, until the appointment of these prætors, the consuls seem to have had the sole jurisdiction in such cases. In the Provinces, the jurisdiction was with the *præsides provinciæ*. There was no true *actio* for the recovery of a *fideicommissum*, neither a *condictio certa* nor *incerta*, as in the “*legata per damnationem*” or “*sinendi modo*,” but only what was denominated a “*persecutio*.” If the *fideicommissum* was large, the matter was adjudicated before the consules; if it were small, before the *prætores fideicommissarii*. Quintilian tells us it was the amount that regulated whether the case fell under the jurisdiction of the consuls or of the prætors. Nor was there any *jus accrescendi* in the case of *fideicommissa*. If several persons had property left them in common, they shared it in the manner directed by the donor; and if any one of the parties were unable to take his share, the other had no claim to it whatever. Thus, suppose a man said, “I wish Titius and Gaius to have my estate.” Titius took one-half and Gaius took the other. But if Gaius died, Titius had no claim upon the other man’s share. Justinian blended the laws by which legacies and *fideicommissa* were regulated, making an entirely new institution by retaining the best features of both systems. The freedom of the *fideicommissum* was retained and combined with the exactness of the law by which legacies were regulated. See Gai. ii. secs. 274, 275, 278, 282, 285, 286. Ulp. Frag. tit. 25. sec. 12. Quint. Instit. Orat. iii. 8. 1. 2. sec. 32. Dig. de orig. jur. (1. 2.). 1. 2. Cod. com. de leg. et fideicommissis. (6.43.)

250. Cum igitur scripserimus :
LUCIUS TITIVS HERES ESTO, possumus

250. When therefore we have
written, “Let Titius be my heir,” we

adicere: ROGO TE, LUCI TITI, PETOQUE A TE, UT CUM PRIMUM POSSIS HEREDITATEM MEAM ADIRE, GAIO SEIO REDDAS RESTITUAS. POSSUMUS AUTEM ET DE PARTE RESTITUENDA ROGARE: ET LIBERUM EST VEL SUB CONDICIONE VEL PURE RELINQUERE FIDEICOMMISSA, VEL EX DIE CERTA. (w)

ought to add, "I pray you, Lucius Titius, and I ask you to render up and to restore my inheritance to Gaius Seius, so soon as possible." We are able also to ask for the restitution of a part; and anyone is free to bequeath a *fideicommissum* conditionally or unconditionally, or from a certain day.

JUST. II. 23. 2.

(w) Fideicommissa resembled legacies in this respect; that they might be made pure and simple, conditional or for a term; and that in such a manner that the heir might be bound to restore the inheritance as soon as he had entered upon it, or upon the happening of an uncertain event; in which case the fideicommissarius received only the gift if he were living at the moment of the accomplishment of the condition. Domenget in loco. Instit. s. 3. de sing. reb. per fid. rel. (2. 24).

251. Restituta autem hereditate is qui restituit nihilominus heres permanet; is vero qui recipit hereditatem, aliquando heredis loco est, aliquando legatarii.

251. Still after the restitution of the inheritance, he who has been instituted nevertheless remains heir: but the party who receives the inheritance is sometimes in the place of an heir, sometimes in that of a legatee.

JUST. II. 23. 3.

252. Olim autem nec heredis loco erat nec legatarii, sed potius emptoris. Tunc enim in usu erat ei cui restituebatur hereditas nummo unam hereditatem dicis causa venire; et quæ stipulationes inter venditorem hereditatis et emptorem interponi solent, eadem interponebantur inter heredem et eum cui restituebatur hereditas, id est hoc modo: heres quidem stipulabatur ab eo cui restituebatur hereditas, ut quicquid hereditario nomine condemnatus fuisset, sive quid alias bona fide dedisset, eo

252. Formerly he was neither in the place of the heir, nor in that of a legatee, but rather in that of a purchaser: for the custom then was that he to whom the inheritance was restored, bought it for the sake of form at a nominal sum; and the customary stipulations between the seller and the purchaser of an inheritance, were observed between the heir and the person to whom the inheritance was restored, that is to say in this manner: the heir indeed received stipulations from the person

nomine indemnis esset, et omnino si quis cum eo hereditario nomine ageret, ut recte defenderetur: ille vero qui recipiebat hereditatem invicem stipulabatur, ut si quid ex hereditate ad heredem pervenisset, id sibi restitueretur; ut etiam pateretur eum hereditarias actiones procuratorio aut cognitorio nomine exequi.

to whom the inheritance was restored, that he should be personally indemnified as to all that he might be condemned to pay as heir, or as to whatever he had given *bona fide*, and that he should be fully and entirely defended if any one should sue him on behalf of the inheritance; but on the other hand, he who received the inheritance obtained in his turn a stipulation, that if anything should hereafter accrue to the heirs from the inheritance, it should be given up to him that he should be allowed to prosecute actions affecting the inheritance, either as by a procurator or a cognitor.

253. Sed posterioribus temporibus Trebellio Maximo^(x) et Annæo Seneca Consulibus senatusconsultum factum est, quo cautum est, ut si cui hereditas ex fideicommissi causa restituta sit, actiones quæ jure civili heredi et heredem competerent ei et in eum darentur cui ex fideicommisso restituta esset hereditas. Post quod senatusconsultum desierunt illæ cautiones in usu haberi. Prætor enim utiles actiones ei et in eum qui recepit hereditatem quasi heredi et in heredem dare cœpit, æquo in edicto proponuntur.

253. But in subsequent times under the consulship of Trebellius Maximus and Annæus Seneca, a senatus-consultum was made, by which it was provided that if an inheritance had been given up to anyone on account of a *fideicommissa*, the civil actions granted both to and against the heir, might be brought against him to whom the inheritance had been surrendered by a *fideicommissum*. After this senatus-consultum, those stipulations (of which we have spoken) fell into disuse. For the Prætor gave *utiles actiones* to and against the party who received the inheritance, just as to and against the legal heir, and these actions are set forth in the edict.

JUST. ii. 23. 4.

(x) The senatus-consultum Trebellianum was enacted in the reign of the Emperor Nero—Annæo Seneca et Trebellio Maximo Consulibus. By this law it was enacted that if the inheritance, in accordance with the will of the testator, were restored to the fideicommissarius, he should be treated as the heir. The actions, both active and passive, as they were

denominated, were transferred to him as *utiles actiones*. The words of this *senatus-consultum* may be found in l. 1. s. 2. Dig. ad Senat. Trebell.(36. 1.) By the *senatus-consultum Trebellianum* the universal *fideicommissarius* was placed in a position analogous in many respects to that of the heir who entered upon the inheritance. He was treated as a universal successor, and his rights were protected by means of the "*fideicommissaria hereditatis petitio*." In regard, however, to the appointing of *fideicommissa*, and likewise to their acquisition, they were treated exactly as though they were legacies. The *fideicommissaria hereditas* was indeed a modified form of inheritance, or *hereditas*, using the latter term in its technical sense. See Puchta, vol. iii. s. 324. pp. 315, 631.

254. Sed rursus quia heredes scripti, cum aut totam hereditatem aut pæne totam plerumque restituere rogabantur, adire hereditatem ob nullum aut minimum lucrum recusabant, atque ob id extinguebantur *fideicommissa*, Pegaso et Pusione *Consulibus* *senatus* censuit, ut ei qui rogatus esset hereditatem restituere perinde liceret quartam partem retinere, atque e lege Falcidia in legatis retinendi (y) *jus* conceditur. Ex singulis quoque rebus quæ per *fideicommissum* relinquuntur eadem retentio permissa est. Per quod *senatus-consultum* ipse onera hereditaria sustinet; ille autem qui ex *fideicommisso* reliquam partem hereditatis recipit, legatarii partiarri loco est, id est ejus legatarii cui pars bonorum legatur. Quæ species legati partitio vocatur, (z) quia cum herede legatarius partitur hereditatem. Unde effectum est, ut quæ solent stipulationes inter heredem et partiarium legatarium interponi, eadem interponantur inter eum qui ex *fideicommissi* causa recipit hereditatem et heredem, id est

254. But again, because the heirs named in the testament when they were required to restore all or nearly all the inheritance, refused to enter upon it, as they would derive from it very little or no advantage, and on that account the execution of the *fideicommissa* failed; the Senate in the consulship of Pegasus and Pusio decreed, that the heir charged to restore the inheritance, should for the future be allowed to retain a fourth part of it as by the *lex Falcidia* the right of retaining a fourth part was conceded in the case of legacies. Also the same retention is allowed in respect of every thing which is bequeathed by *fideicommissum*. By means of this *senatus-consultum* the heir himself sustained the charges of the inheritance; but he who received the residue of the inheritance by virtue of the *fideicommissum*, is in the place of a part-legatee, that is to say, of that legatee to whom a part of the property is bequeathed. This kind of legacy is called "*partitio*," because the legatee divides

ut et lucrum et damnum hereditarium pro rata parte inter eos commune sit.

JUST. II. 23. 5.

the inheritance with the heir; the effect of which is that the stipulation usually interposed between an heir and a part-legatee, are interposed between him who receives the inheritance by *fideicommissum* and the heir, that is to say, that the gain and the loss resulting from the inheritance are sustained by them in proportional parts.

(y) Huschke says that in the place of the second *retinere* in this section, which is found in the Institutes of Justinian, the MS. has *retinendis*. It is therefore more natural with Gneist in the text to read “*retinendi jus*.” Kritik. p. 51.

(z) *Partitio vocatur*. “Atque etiam dant hoc Scævola quod est partitio; ut si in testamento deducta, scripta non sit, ipsique minus ceperint quam omnibus heredibus relinquatur, sacrisne alligentur.” Cic. de leg. ii. 20. See Ulp. xxiv. 25. l. 164. s. 1. Dig. de verb. sig. (50. 16). Theophilus in loco.

255. Ergo si quidem non plus quam dodrantem hereditatis scriptus heres rogatus sit restituere, tum ex Trebelliano senatusconsulto restituitur hereditas, et in utrumque actiones hereditariae pro rata parte dantur: in heredem quidem jure civili, in eum vero qui recipit hereditatem ex senatusconsulto Trebelliano. Quamquam heres etiam pro ea parte quam restituit heres permanet, eique et in eum solidae actiones competunt: sed non ulterius oneratur, nec ulterius illi dantur actiones, quam apud eum commodum hereditatis remanet.

JUST. II. 23. 6.

255. Therefore if the heir appointed by will is not required to restore more than three-fourths of the inheritance, he restores it by virtue of the senatus-consultum Trebellianum, and actions affecting the inheritance may be brought against both according to their proportional shares; against the heir by the *jus civile* and against him who receives the inheritance by the senatusconsultum Trebellianum. Although the heres remains heir even for that part which he has surrendered, and complete remedies (*actiones solidae*) exist for and against him for the whole; but he is not burdened beyond that which he has received, and actions are not given against him beyond the value of the advantages which accrue to to him from the inheritance.

256. At si quis plus quam dodrantem vel etiam totam hereditatem restituere rogatus sit, locus est Pegasiano senatusconsulto. (a)

256. But if anyone be called upon to surrender more than three-fourths, or even the whole inheritance, the Pegasian senatus-consultum comes into operation.

JUST. II. 23. 6.

(a) The two senatus-consulta, Trebellianum and Pegasianum stand in close connection. If the *oneratus* were bound only to render three-fourths of the property to which he succeeded, or less, the senatus-consultum Trebellianum was applicable, and no stipulations intervened. If, however, more than three-fourths of the estate were to be given up by the *oneratus*, the fideicommissarius was regarded as a *legatarius partiarius*, and a “*stipulatio quasi partis et pro parte*” was entered into, to guarantee the heir against the actions to which he might be exposed on the one hand, or for the restitution on the other hand, of the property which he had received from the estate. Domenget’s note on secs. 255, 256. Puchta’s Instit. pp. 315, 316.

257. Sed is qui semel adierit hereditatem, si modo sua voluntate adierit, sive retinuerit quartam partem sive noluerit retinere, ipse universa onera hereditaria sustinet, sed quarta quidem retenta quasi partis et pro parte stipulationes interponi debent tamquam inter partiarium legatarium et heredem; si vero totam hereditatem restituerit, ad exemplum emptæ et venditæ hereditatis stipulationes interponendæ sunt.

257. But he who has once entered upon the inheritance, if only he has done so of his own free will, whether he has retained a fourth part, or has been unwilling to do so, takes upon himself the entire burden of the inheritance; but after having retained the fourth part, stipulations of division, called *partis et pro parte* ought to intervene, as between a part-legatee and the heir, if however he has surrendered the whole inheritance, stipulations must intervene after the analogy of the sale and purchase of an inheritance.

JUST. II. 23. 6.

258. Sed si recuset scriptus heres adire hereditatem, ob id quod dicat eam sibi suspectam esse quasi damnosam, cavetur Pegasiano senatusconsulto, ut desiderante eo cui resti-

258. But if the instituted heir refuses to enter upon the inheritance, because he declares that the inheritance appears to be injurious to him, it is in this case provided by the

tuere rogatus est, jussu Prætoris adeat et restituat, perindeque ei et in eum qui receperit actiones dentur, ac juris est ex senatusconsulto Trebelliano. Quo casu nullis stipulationibus opus est, quia simul et huic qui restituit securitas datur, et actiones hereditariæ ei et in eum transferuntur qui receperit hereditatem.

Pegasian senatus-consultum, that on the demand of him to whom he had been required to restore the inheritance, he should under an order of the prætor, enter on the inheritance and make surrender; and then actions may be brought by or against him who has received the inheritance, just as if it fell under the rule of law established by the senatus-consultum Trebellianum. And in this case stipulations are not necessary, for at the same time security is given to the heir, who has surrendered the inheritance, and actions concerning the inheritance are transferred to and against him who has received it.

JUST. II. 23. 6.

259. Nihil autem interest utrum aliquis ex asse heres institutus aut totam hereditatem aut pro parte restituere rogetur, an ex parte heres institutus aut totam eam partem aut partis partem restituere rogetur: nam et hoc casu de quarta parte ejus partis ratio ex Pegasiano senatusconsulto haberi solet. (b)

259. But it makes no difference whether any one who is instituted heir to the whole inheritance (*ex asse*), is required to restore the whole or a part, nor whether being instituted to a part, he is required to restore either that entire part, or a portion of the part, for in this case the senatus-consultum Pegasianum usually authorizes the retention of the fourth of the portion received.

JUST. II. 23. 8.

(b) Justinian abolished the senatus-consultum Pegasianum, and ordained that the restitution of the inheritance should be always made in accordance with the provision of the senatus-consultum Trebellianum.

If the testator had left nothing for the heir, or if he had given less than the quarta, the *institutus* could retain or complete the quarta, and even reclaim it, if he had paid it. In accordance with this disposition, the actions were divided proportionately between the heir and the fideicommissarius, and if the heir restored the inheritance without retaining anything, the actions were concentrated, both actively and passively, on the head of the fideicommissarius. Moreover,

the *institutus* might be constrained to restore the inheritance to the fideicommissarius in spite of his refusal to make addition therein. If the person bound to make restitution were an *heres legitimus*, he could not employ the *senatus-consultum Trebellianum* and *Pegasianum*; but the Emperor Antonius Pius authorized him to retain the *quarta*. Instit. secs. 79. de fidei. hered. (2. 23). 1. 1. sec. 1. Dig. ad sen. con. Trebell. (36. 1). 1. 18. Dig. ad leg. Falcid. (35. 2). *Domenget in loco*.

260. Potest autem quisque etiam res singulas per fideicommissum relinquere, velut fundum, hominem, vestem, argentum, pecuniam; et vel ipsum heredem rogare, ut alicui restituat, vel legatarium, quamvis a legatario legari non possit.

261. Item potest non solum propria testatoris res per fideicommissum relinquere, sed etiam heredis aut legatarii aut cujuslibet alterius. Itaque et legatarius non solum de ea re rogari potest, ut eam alicui restituat, quæ ei legata sit, sed etiam de alia, sive ipsius legatarii sive aliena sit. Sed hoc solum observandum est, ne plus quisquam rogetur alicui restituere, quam ipse ex testamento ceperit: nam quod amplius est inutiliter relinquatur.

262. Cum autem aliena res per fideicommissum relinquatur, necesse est ei qui rogatus est, aut ipsam redimere et præstare, aut æstimationem ejus solvere. Sicut juris est, si per damnationem aliena res legata sit tamen qui putant, si rem per fideicommissum relictam dominus non vendat, extinguere fideicommissum;

260. But every one can leave particular objects by *fideicommissa*, as for example, an estate, a slave, a vestment, silver or money; and pray either the heir himself or the legatee, to surrender it to a certain person; although a legacy cannot possibly be bequeathed away from a legatee.

261. Also the property not only of a testator may be bequeathed by *fideicommissum*, but also that of his heir or of a legatee, or of any other person. Wherefore a legatee may not only be requested to give to another what has been left to him, but any other thing, whether it is his own or the property of another. Moreover this rule must be observed that no one can be requested to restore more than he has received under the testament; since anything beyond this bequest is invalid.

262. But when the property of another is left by a *fideicommissum*, it is compulsory on the person required to restore it, either to purchase it from the owner, and bestow the thing itself, or to pay its value. The same is the rule of law when a person has bequeathed the property of another *per damnationem*; yet there

sed aliam esse causam per damnationem legati. (c)

are some jurists who are of opinion, that if the owner of the thing left by a *fideicommissum* will not sell it, the *fideicommissum* is extinguished, but the case of a legacy *per damnationem* is different.

(c) Gaius here marks a distinction between a legacy given *per damnationem* and a *fideicommissum*. This difference was not maintained in the later law, but yielded to the reforms of Justinian.

263. Libertas quoque servo per fideicommissum dari potest, ut vel heres rogetur manumittere, vel legatarius.

263. Freedom also may be given to a slave by a *fideicommissum*; as when either the heir or legatee is required to manumit him.

JUST. II. 24. 2.

264. Nec interest utrum de suo proprio servo testator roget, an de eo qui ipsius heredis aut legatarii vel etiam extranei sit.

264. Nor does it signify whether the testator require this respecting his own slave, or the slave of his heir, or of a legatee, or of a stranger.

265. Itaque et alienus servus redimi et manumitti debet. Quod si dominus eum non vendat, sane extinguitur libertas, quia pro libertate pretii computatio nulla intervenit.

265. And thus a slave belonging to another person should be bought and manumitted. But if the owner of the slave refuses to sell him, liberty is lost for the slave, because no pecuniary compensation can be weighed against liberty.

266. Qui autem ex fideicommisso manumittitur, non testatoris fit libertus, etiamsi testatoris servus sit, sed ejus qui manumittit.

266. Now he who is manumitted by virtue of a *fideicommissum* does not become the freedman of the testator, although he was the testator's own slave, but the freedman of the manumittor.

267. At qui directo testamento, liber esse jubetur, velut hoc modo: STICHUS SERVUS MEUS LIBER ESTO, vel STICHUM SERVUM MEUM LIBERUM ESSE JUBEO, is ipsius testatoris fit libertus.

267. But a slave who receives his liberty directly from the testament, as in this manner, "Let Stichus my slave be free," or "I enjoin that Stichus my slave shall be free," be-

Nec alius ullus directo ex testamento libertatem habere potest, quam qui utroque tempore testatoris *ex jure Quiritium fuerit, et quo facerit testamentum et quo moreretur.* (*d*)

comes the freedman of the testator. And no one can obtain liberty directly by testament, unless he were the slave of the testator *ex jure Quiritium*, both at the time of the testator's making his testament, and also at the time of his death.

JUST. II. 24. 2.

(*d*) To bequeath freedom directly to a slave was in effect to dispose of the slave. It was in point of fact to make a legacy *per vindicationem*. But if the testator was not owner of the slave at the moment of executing his will, the legacy was null and void. Nor could it afterwards convalesce by the lapse of time. It made no difference whether the testator died immediately after making his will, or at some remote period, as there was a fatal flaw from the very beginning. Hence, the "regula Catoniana" applied: "*Quod ab initio vitiosum est tractu temporis convalescere nequit.*" Nor could the legacy be rendered valid, *optimo jure*, by virtue of the senatus-consultum Neronianum. This enactment only remedied a defect which arose in the *form* in which the legacy had been made, when something had been omitted required by the *jus civile*. In this case the defect was in the person of the legatee, and was consequently beyond the purview of the Neronian law. See Domenget in loco.

268. Multum autem differunt quæ per fideicommissum relinquuntur ab his quæ directo jure legantur.

268. Things left by *fideicommissum* differ in many respects from those bequeathed in strict legal form.

269. Nam ecce per fideicommissum etiam *nutu* hereditas (*e*) relinqui potest: cum alioquin legatum nisi testamento facto inutile sit.

269. For an inheritance can be bequeathed *per fideicommissum* by a mere nod; whereas on the contrary a legacy is inoperative, except when made by a testament.

(*e*) *Nam ecce per fideicommissum etiam nutu hereditas.* This is a conjectural reading, and is adopted by Gneist

from Blume, who has inserted it supposing it to be the correct reading, judging from the number of the letters, and also from the statement of Ulpianus, who uses the word *nutu* in this connection. Another reading is “*Etiam post mortem heredis relinqui potest.*” “*Non potest fieri heredis institutio, sed legata recte possunt relinqui nutu,*” says the glossator; and again, “*Nutum interveneri sufficit ubi voce non est opus.*” l. 93. Dig. de acq. vel sunt. her. (29. 2.) Daoyz, sub voce “*Nutu.*” Ulp. xxv. 3. s. 21. pr. Dig. de legat. (3. 32). l. 22. Cod. de fidei. hered. (6. 42).

270. Item intestatus moriturus potest ab eo ad quem bona ejus pertinent *fideicommissum* alicui relinquere: cum alioquin ab eo legari non possit. (f)

270. Again he who is about to die intestate, can charge upon him to whom his property falls, a *fideicommissum* in favour of a third party; when otherwise it cannot be bequeathed.

(f) Codicils required to be confirmed by a testament only so far as they contained legacies, since they depended for their validity upon the testament to which they were attached. It was necessary to look back to the epoch of the testament, in order to test the validity of legacies. l. 2. s. 2. Dig. de jure codicil. (29. 7). No one could by means of a codicil either dispose of or take possession of an inheritance. A person might make a codicil, and then die, having made a testament; or he might make a codicil and die intestate. Instit. secs. 1. 2. de codicil. (2. 25). Nevertheless, a person might by means of a codicil give an “*hereditas fideicommissaria.*” See Domenget, p. 281.

270a. Item *legatum codicillis* relictum non aliter valet, quam si a testatore confirmati fuerint, id est nisi in testamento caverit testator, ut quidquid in codicillis scripserit id ratum sit: *fideicommissum* vero etiam non confirmatis codicillis relinqui potest.

270a. Again a legacy left in a codicil is only valid when it has been confirmed by the testator, that is to say, when the testator has declared in his testament that what he has written in his codicils shall have operation; but a *fideicommissum* can be left by codicils not confirmed.

271. Item a legatario legari non potest : sed fideicommissum relinqui potest. Quin etiam ab eo quoque cui per fideicommissum relinquimus rursus alii per fideicommissum relinquere possumus.

271. Again a legacy cannot be charged upon a legatee; but a *fideicommissum* may be thus devised. We can even charge upon him to whom we have left by *fideicommissum*, a second *fideicommissum* in favour of a third party.

272. Item servo alieno directo libertas dari non potest sed per fideicommissum potest.

272. Again, freedom cannot be given directly to another's slave, but it may be by a *fideicommissum*.

273. Item codicillis nemo heres institui potest neque exheredari, quamvis testamento confirmati sint. At hic qui testamento heres institutus est potest codicillis rogari, ut eam hereditatem alii totam vel ex parte restituat, quamvis testamento codicilli confirmati non sint. (g)

273. Again no one can be instituted heir, nor disinherited in a codicil although it may be confirmed by a testament; but he who is instituted heir by testament may be requested by codicil to restore either the whole or a part of the inheritance, although the codicils be not confirmed by testament.

(g) Gaius does not fully consider the subject of codicils, which are treated by Justinian in the Institutes under the rubric "De codicillis" (2. 25). The following remarks, however, may be useful. The word *Codicillus* is a diminutive of *Codex*, and denotes a tablet (*tabula*). There were codices, "membranei, chartacei, ebori." 1. 52. pr. Dig. de leg. et fid. (32). The term was especially used to denote one sheet out of several *tabulæ* or leaves. Hence it came to be applied to the final disposition of a person which originally consisted simply of a letter from the testator to the heir. Subsequently it was applied to a form as distinct and marked as the testament itself, which in the later law was thus distinguished formally. In a material point of view it differed from a testament inasmuch as it admitted of no direct institution of an heir, and of no disinheritance. Instit. tit. de codicil. (2.25). Dig. de jure cod. (29. 7). Cod. de codicil. (6. 36.) 1. 88. s. 1. Cod. de testam. (6. 23). 1. 52. pr. Dig. de legatis (3. 32). No special form was required in the case of codicils; and hence Justinian says, "Codicillos autem etiam plures quis

facere potest, et nullam sollemnitatem ordinationis desiderant." s. 3. tit. cit. (2. 25.). Marcianus also says, "Et ipsius manu neque scribi neque signari necesse est." The language of Justinian, as Boecking observes, must be understood as applying only to the form of the document, and not to the solemnities required for its establishment. Codicils are either "testamento (aut in futurum aut in præteritum) confirmati, aut sine testamento." Constantine ordained that in order to render an intestate codicil valid, there should be "septem testium vel quinque interventus," otherwise the codicil was invalid. l. 1. Th. Cod. (4. 4.) Theodosius required five witnesses for the making of a verbal or written codicil, but dispensed with the sealing by the witnesses in the case of a written codicil. l. 8. s. 3. Cod. de codicil. (6. 36). Justinian allowed the imposing of direct obligation upon those beneficially entitled. l. 32. Cod. de fid. (6. 42). A codicil was not cancelled by the simple making of a new one, but it might be annulled by revocation. l. 5. Dig. de jur. cod. (29. 7). Instit. s. 1. tit. cit. (2. 25). l. 77. Dig. de her. inst. (28. 5). Boecking's Instit. pp. 271—273.

274. Item mulier quæ ab eo qui centum milia aris census est, per legem Voconiam heres institui (*h*) non potest, tamen fideicommisso relictam sibi hereditatem capere potest.

274. Also a woman who according to the *lex Voconia*, cannot be instituted heir by anyone who has more than 100,000 asses, may yet receive by *fideicommissum* an inheritance left to her.

(*h*) Huschke observes that if Gaius had said that a woman cannot be instituted heir by virtue of the *lex Voconia* (*heres institui non potest*) to a citizen enrolled in the first-class in the census, this law must have declared that such an institution was void. Relying on this reading, he has, with many other modern jurists, taken the Voconian law for a *lex perfecta*, though acknowledging the difficulty; for admitting this to be the case, it is the only *lex* of the kind before the decline of Roman liberty. Such an exception,

he thinks, is scarcely to be imagined, since all the other restrictions relate to the *jus capiendi*. He further says there is no other passage which supports the opinion that the *lex Voconia* is a *lex perfecta*. According to Cicero, in *Verr.* lib. i. 42, it was enacted “ne quis heredem virginem neve mulierem faceret.” With regard to the effects of such an institution, all that is certainly known is that a woman cannot, according to this law, become heir—*heres esse* (*Cic. de rep.* 3. 10), nor, according to Dionysius, *κληρονομεῖν* (*Dio.* 56. 10.) All difficulties vanish if we observe that the MS. has by no means “heres institui,” but “hdes. institutio.” It is much easier to read “heredis institutione” than “heres institui.” If it is supposed that the last word the copyist wrote was “institution,” writing the *n* of “non” once instead of twice; it may be read, “Item mulier quæ ab, etc., per legem Voconiam institutione non potest.” To accord with the style of Gaius, the displacing of the verb “capere” before “non potest” must also be admitted. Probably “capere” was noted with *c̄*, which letter elsewhere occurs only in conjunction with *u*, for “usucapere.” The words “ab eo” are to be taken with *capere*, and “heredis institutione” to be considered as antithetic to “fideicommissa.” See *Recht des Nexum*, p. 120, and *Kritik*, pp. 51—53.

275. Latini quoque qui hereditates legataque directo jure lege Junia capere prohibentur, ex fideicommisso capere possunt.

275. Latini also, who according to the *lex Junia* cannot in strict law receive either inheritances or legacies, may receive them by *fideicommissum*.

276. Item cum senatusconsulto prohibitum sit proprium servum minorem annis xxx liberum et heredem instituere, plerisque placet posse nos jubere liberum esse, cum annorum xxx erit, et rogare, ut tunc illi restituantur hereditas. (*i*)

276. Again, when it is prohibited by a senatus-consultum to free one's slave who is under thirty years of age by testament, and to institute him heir, it is a general opinion that we can enjoin that this slave be free when he shall have attained thirty years, and require that the hereditas shall be restored to him at this period.

(i) Huschke says that Goeschen has objected to the mention of a *senatusconsultum* as the origin of this rule of law, which he thinks is much more likely to have arisen from the *lex Ælia Sentia*. This is how the matter appears to him : "According to the *lex Ælia Sentia*, the slave under thirty years of age freed by a testament, was dependent on the prætor for his freedom, and consequently would remain a slave by the civil law." It can hardly be doubted that one could not openly mancipate a slave, and then effectually institute him as heir, for the right to inherit depended upon the *jus civile*. It is also to be observed that the institution of a *servus incapax* was even void from the beginning and differed from the case of a free *incapax*. Thus Ulpianus says, "*Eum servum qui tantum in bonis noster est, nec cum libertate heredem instituere possumus, quia Latinitatem consequitur, quod non proficit ad hereditatem capiendam.*" Ulp. tit. xxii. 8. According to both the *lex Ælia Sentia* and the *lex Junia*, freedom itself would have been illegally granted if the testator had instituted as heirs only those of his slaves who were under thirty years of age. That the matter was thus viewed in the *lex Ælia Sentia* is proved by that exceptional provision of the law according to which an insolvent master by his testament might free a slave under thirty years of age, and institute him as his heir. Gai. i. 21. Ulp. i. 14. The question, however, was, whether one could not free and institute such a slave as heir under the condition of his becoming thirty years old—a condition that according to its legal meaning would only have the nature of a "dies." That the gift of freedom made the slave a Roman citizen appears according to the conclusion of the present section, to have been the opinion of most of the ancient jurists, and rightly so, for testamentary freedom could be bestowed "*ex die;*" and the prefix "*heresque,*" if invalid, could not be prejudicial. l. 22. Dig. de condit. instit. (88. 7.) One might indeed object that this was contrary to the intention of the law, which declared that Roman citizenship should only be bestowed on a slave

under thirty years of age after “*justa causa probata*.” It frequently happened that the master of a slave under thirty years of age manumitted the same by will under a condition expressed in his testament of the slave attaining the full legal age. But whether in this case the institution was also valid, was much more doubtful, because the heir, according to the very nature of inheritance, must be regarded as becoming such immediately on the decease of the testator. Hence an institution made “*dies ex quo*” could only be maintained by supposing the “*dies*” as not written. l. 34. Dig. de hered. inst. (28.5.) The institution “*Stichus liber esto et si liber erit heres esto*” was the subject of doubt and argument, and was first pronounced legal by a rescript of Marcus, because the words “*si liber erit*” could be struck out as mere surplusage. l. 51. pr. Dig. de hered. instit. (28.5). Here, however, Roman freedom was not, as in the previous case, merely an idea, but took place from the moment when the capability of inheriting became possible. It might be said, as was admitted at the time of Modestinus, “*in tempus capiendæ hereditatis institui heredem posse, benevolentiae est, veluti; Lucius Titius, cum capere potuerit, heres esto.*” l. 62. pr. Dig. eod.; (28.5.) l. 51. Dig. de leg. 2. (31).

Again, if we understand the prohibition of the *senatus-consultum* to refer to the institution of a slave under thirty years of age, accompanied with the grant of freedom and contingent on his reaching that age, it at once becomes apparent why, at the conclusion of our section this case is presented to illustrate the restitution of the inheritance in the case of a *fideicommissum*. For as a *Latinus* could inherit *per fideicommissum*, and as the slave under thirty years of age by testamentary freedom might become a *Latinus*, so there can be no doubt that a testator could legally bequeath his inheritance *per fideicommissum* to his slave unconditionally freed, even though the latter were under thirty years of age. This view is forcibly though concisely discussed by Huschke (*Kritik*. p. 53).

277. Item quamvis non *possimus* post mortem ejus qui nobis heres extiterit, alium in locum ejus heredem instituere, tamen possumus eum rogare, ut cum morietur, alii eam hereditatem totam vel ex parte restituat. Et quia post mortem quoque heredis fideicommissum dari potest, idem efficere possumus et si ita scripserimus; CUM TITIVS HERES MEVS MORTVVS ERIT, VOLO HEREDITATEM MEAM AD PVBIVM MÆVIVM PERTINERE. Utroque autem modo, tam hoc quam illo, Titius heredem suum obligatum relinquit de fideicommisso restituendo.

278. Præterea legata *per formulam* petimus: fideicommissa vero Romæ quidem aput Consulem vel aput eum Prætorem qui præcipue de fideicommissis jus dicit persequimur; in provinciis vero aput Præsidem provinciae.

279. Item de fideicommissis semper in urbe jus dicitur: de legatis vero, cum res aguntur.

280. Fideicommissorum usurae et fructus debentur, si modo moram solutionis fecerit qui fideicommissum debet: legatorum vero usurae non debentur; idque rescripto divi Hadriani significatur. Scio tamen Juliano placuisse in eo legato quod sinendi modo relinquitur idem juris esse quod in fideicommissis: quam

277. Again, although we are not able to institute a second heir in the place of one who has died after having declared his acceptance, still we have power to charge him that at his death he shall restore the inheritance to another, either the whole or a part thereof: and because, also, after the death of the heir a *fideicommissum* can be given. The same result may be attained as follows; if we write, "As soon as my heir Titius is dead, I wish my inheritance to belong to Publius Mævius." In both cases, as well in the one as the other, we oblige our heir Titius to the restitution of the *fideicommissum*.

278. Moreover, legacies are sued for by means of the formula; Fideicommissa on the other hand are claimed at Rome, before the consul or the Prætor, who has jurisdiction especially in cases of fideicommissa: but in the provinces before the President of the province.

279. Again at Rome, judgment is given in fideicommissa at all times; but in matters relating to legacies, only on days appointed for the transaction of legal affairs (*cum res aguntur*).

280. The interest and fruits of a fideicommissum are also due, if only he from whom it should have been received has made a delay in the payment thereof (*moram solutionis*); but on the other hand interest for legacies is not due, and this is determined by a rescript of Hadrian. Yet I know that Julian was of

sententiam et his temporibus magis optinere video.

opinion that in the case of a legacy left *sinendi modo*, the same rule of law applied as in fideicommissa; and this opinion I perceive also prevails in our times.

281. Item legata Græce scripta non valent: fideicommissa vero valent. (j)

281. Again legacies written in Greek are invalid; but fideicommissa are valid.

(j) Gaius is careful to explain that a fideicommissum could be made in any language, and even by a gesture. This, as we have seen, was not the case with legacies. In the reign of Constantine a legacy was allowed to be made in the Greek tongue; hence the emperor says, "In legatis vel fideicommissis verborum necessaria non sit observantia." l. 21. Cod. de leg. (6. 37.) ll. 11. 24. Dig. de legatis (3. 23.) Brissonius de verb. sig. sub voce "Nutum."

282. Item si legatum per damnationem relictum heres infitietur, in duplum cum eo agitur: fideicommissi vero nomine semper in simplum persecutio est.

282. Again if an heir denies that a legacy has been left *per damnationem*, the action proceeds against him for the double, (*in duplum*) the prosecution, on the other hand (*persecutio*), for the fideicommissa is always single (*in simplum*).

283. Item quod quisque ex fideicommisso plus debito per errorem solverit, repetere potest: at id quod ex causa falsa per damnationem legati plus debito solutum sit, repeti non potest. Idem scilicet juris est de eo [legato] quod non debitum vel ex hac vel ex illa causa per errorem solutum fuerit. (k)

283. Further, whatever any one has paid more than was due, through error, under a fideicommissum, he can reclaim; but on the other hand, whatever has been paid more than was due in a legacy *per damnationem* under an erroneous supposition cannot be reclaimed. Precisely the same rule of law holds good when a legacy which is not due has been paid in error from some cause or the other.

(k) When a fideicommissum had been paid in error to a *persona incerta*, it could not be reclaimed. Justinian says,

"Incertis autem personis legata vel fideicommissa relicta et per errorem soluta repeti non posse, sacris constitutionibus cautum erat." Instit. s. 25. de legatis. (2. 20).

284. Erant etiam aliæ differentiæ, quæ nunc non sunt.

284. There were also other differences which do not exist at the present time.

285. Ut ecce peregrini poterant fideicommissa capere: et fere hæc fuit origo fideicommissorum. Sed postea id prohibitum est: et nunc ex oratione (l) divi Hadriani senatusconsultum factum est, ut ea fideicommissa fisco vindicarentur.

285. Peregrini for example could acquire (*capere*) fideicommissa, and this was almost the origin of fideicommissa. But subsequently this was prohibited, and now by virtue of an oratio of Hadrian a senatusconsultum was passed, empowering the fisco to obtain such fideicommissa by means of the vindicatio.

(l) The "oratio" was a mode of legal enactment that came into vogue at Rome after the fall of the republic. Instit. Rom. Law, p. 63. We find a number made by Marcus; as for example "D. Marci Oratione in senatu recitata efficit, etc." 1. 8. Dig. de transact. (2. 15.) For a list of examples of the "oratio" consult Brissonius sub voce "Oratio," p. 977. By a constitution of the Emperor Caracalla, all the subjects of the Roman empire were declared to be citizens. A question has been raised whether this included the peregrini: Ortolan thinks that it did; others are of opinion that by this constitution only those of the subjects of the emperor were benefitted who, at the moment of the promulgation of the law were qualified to attain to the citizenship, but had not actually obtained it. Ortolan, tit. i. p. 294 et seq. Domenget, p. 286.

286. Cælibes quoque qui per legem Juliam hereditates legataque capere prohibentur, olim fideicommissa vi-

286. Celibates also, who were prohibited by the Julian law from receiving inheritances and legacies

debantur capere posse. Item orbi qui per legem Papiam, ob id quod liberos non habent, dimidias partes hereditatem legatorumque perdunt, olim solida fideicommissa videbantur capere posse. Sed postea senatus-consulto Pegasiano perinde fideicommissa quoque, ac legata hereditatesque capere posse prohibiti sunt. Eaque translata sunt ad eos qui testamento liberos habent, aut si nullus liberos habebit, ad populum, sicuti juris est in legatis et in hereditatibus.

287. Eadem aut simili ex causa autem olim incertæ personæ vel postumo alieno per fideicommissum relinqui poterat, quamvis neque heres institui neque legari ei possit. Sed senatusconsulto quod auctore divo Hadriano factum est idem in fideicommissis quod in legatis hereditatibusque constitutum est. (*m*)

(*m*) This rule was not maintained by Justinian, who permitted bequests to be made to uncertain persons and also to the postumi. The emperor after referring to heirs, legatees, and those taking *per fideicommissa*, says, in relation to posthumous strangers, "Postumus autem alienus heres institui et antea poterat et nunc potest, nisi in utero ejus sit, quæ jure nostro uxor esse non potest." Instit. secs. 27, 28. de leg. (2. 20). Domenget in loco.

288. Item poenæ nomine jam non dubitatur nec per fideicommissum quidem relinqui posse.

appear formerly to have been able to acquire fideicommissa. Also childless persons, who by the Papian law, because they have no children, lose the half of an inheritance and of legacies, could, it seems, formerly acquire the whole per fideicommissa. But subsequently by the senatus-consultum, Pegasianum they were in like manner prohibited from taking fideicommissa, as well as inheritances. And the fideicommissa given to them were transferred to those persons in the testament who had children, or if none had children, to the populus: just as the rule of law is in regard to legacies and inheritances.

287. But from the same or from a similar cause, fideicommissa, could formerly be left to indefinite persons (*incertæ personæ*), or to a posthumous stranger (*alieno postumo*), although the latter could neither be instituted heir nor receive a legacy. But by a senatus-consultum made by the authority of Hadrian, the same rule of law was established for fideicommissa as for legacies and inheritances.

288. Again, no one now doubts that a fideicommissum cannot be left to a person for the infliction of a penalty (*pœnæ nomine*).

289. Sed quamvis in multis juris partibus longe latior causa sit fideicommissorum, quam eorum quæ directo relinquuntur, in quibusdam tantumdem valeant: tamen tutor non aliter testamento dari potest quam directo, veluti hoc modo: LIBERIS MEIS TITIUS TUTOR ESTO, vel ita: LIBERIS MEIS TITIIUM TUTOREM DO: per fideicommissum vero dari non potest

289. But although in many legal relations, the rights of fideicommissa are far more extensive than those dispositions which are made directly (*directo*), yet in certain respects, both kinds have a similar operation: thus a tutor cannot be appointed otherwise by testament than directly, that is to say, in the following manner: "Titius shall be tutor to my children," or thus, "I give Titius to be tutor to my children," but a tutor cannot be appointed by fideicommissum.

PRÆTORIAN SUCCESSION.
TABLE OF THE DIFFERENT DEGREES OF RELATIONSHIP.

Degrees.	Descending Line.	Ascending Line.	COLLATERAL LINE.			
1	Filius, filia.	Pater, mater.				
2	Nepos, neptis.	Avus, avia.	Frater, soror.			
3	Pronepos, proneptis.	Proavus, proavia.	Patruus, amita, avunculus, matertera.	Fratr̄is sororisve, filius, filia.		
4	Abnepos, abneptis.	Abavus, abavia.	Patruus magnus, amita magna, avunculus magnus, matertera magna.	Consobrinus, consobrina.	Fratr̄is sororisve, nepos, neptis.	
5	Adnepos, adneptis.	Atavus, atavia.	Propatruus, proamita, proavunculus, promatertera.	Propior sobrinus, propior sobrina.	Consobrini consobrinae filius, filia.	Fratr̄is sororisve pronepos, proneptis.
6	Trinepos, trineptis.	Tritavus, tritavia.	Abpatruus, abamita, abavunculus, abmatertera.	Propatruus, proamita, proavunculi, promatertera, filius, filia.	Sobrini, sobrina.	Consobrini consobrinae, nepos, neptis, fratris, sororisve, abnepos, abneptis.

(See Book iii. sec. 32.)

COMMENTARY THE THIRD.

1. *Intestatorum hereditates lege XII tabularum primum ad suos heredes pertinent.*

1. By the provisions of the law of the Twelve Tables the right of succession to intestates belongs to their *sui heredes*.

JUST. iii. 1. 1.

(a) In the third book of his Commentaries Gaius treats of two important subjects. In the first place he completes the discussion of the Law of Inheritance, confining himself in this book to *intestate* succession. This topic occupies eighty-seven sections of the commentary. At the eighty-eighth section, commencing with the words, “Nunc trans-eamus ad obligationes,” he begins the Institutes of the Roman Law of Obligations. The attention of the student will be directed to this important subject in its proper place.

Justinian thus defines intestacy: he says, “Intestatus decessit, qui aut omnino testamentum non fecit, aut non jure fecit; aut id, quod fecerat, ruptum irritumve factum est, aut nemo ex eo heres extitit.” Inst. pr. de hered. quæ ab etc. (3. 1). This agrees with the statement of Paulus, who says, “Intestatus est, non tantum qui testamentum non fecit, sed etiam cujus ex testamento hereditatis adita non est.” 1. 64. de verb. sig. (50. 16.) Ulp. Frag. xxvi. tit. 1. Thus a person was properly said to be intestate who had not made a testament at all, or who had made one which could not be sustained as valid after his decease. Again,

Quintilian says, “*Neque ego negaverim, non uno genere fieri intestatos. Aut is est intestatus, qui non scripsit testamentum, aut qui id scripsit, quod valere non possit.*” Declam. cccviii. Brissonius, sub voce “*Intestatus.*”

2. *Sui autem heredes existimantur liberi qui in potestate morientis fuerint, veluti filius filiave, nepos neptisve ex filio, pronepos proneptisve ex nepote filio nato prognatus, prognatare, nec interest utrum naturales sint liberi, an adoptivi. Ita demum tamen nepos neptisve et pronepos proneptisve suorum heredum numero sunt, si præcedens, persona desierit in potestate parentis esse, sive morte id acciderit sive alia ratione, veluti emancipatione: nam si per id tempus quo quis moritur filius in potestate ejus sit, nepos ex eo suus heres esse non potest. Idem et in ceteris deinceps liberorum personis dictum intellegemus.*

2. Now those children are regarded as *sui heredes*, who were under the power of the deceased at the time of his death e. g. a son or a daughter, a grandson or granddaughter by a son, a great grandson or great granddaughter, descended from a grandson, begotten by a son. Nor does it make any difference whether they are one's own or adopted children. Yet, indeed, the grandson, granddaughter, and the great-grandson, or great-granddaughter are only in the number of *sui heredes*, when the person preceding them in agnation has ceased to be under the power of the *parens*, whether this has happened from death or any other cause, as for example, by emancipation. For if at the time when a man dies his son is under his potestas, his grandson by that son cannot be his *sui heres*; and we apply the same rule to all other claims of ascendants

JUST. iii. 1. 2.

3. *Uxor quoque quæ in manu est sua heres est, quia filie loco est; item nurus quæ in filii manu est, nam et hæc neptis loco est. Sed ita demum erit sua heres, si filius cujus in manu erit, cum pater moritur, in potestate ejus non sit. Idemque dicemus et de ea quæ in nepotis manu matrimonii causa sit, quia proneptis loco est.*

3. A wife also who is *in manu* is a *sua heres*, because she is in the place of a daughter; the same is the case with a daughter-in-law who is in the *manus* of a son, for she is in the position of a granddaughter; but so that she will only be a *sua heres*, if the son in whose *manus* she shall be when the father dies, is not under his potestas. We affirm the same thing also of her who is by marriage in the *manus* of a grandson, because she is in the place of a granddaughter.

JUST. iii. 1. 2.

4. *Postumi quoque, qui si vivo parente nati essent, in potestate ejus futuri forent, sui heredes sunt.*

4. Also these *postumi* are *sui heredes* who would have been under the power of their agnate ascendant if they had been born while he was living.

JUST. iii. 1. 2.

5. *Idem juris est de his quorum nomine ex lege Ælia Sentia vel ex senatusconsulto post mortem patris causa probatur: nam et hi vivo patre causa probata in potestate ejus futuri essent.* (b)

5. The same rule of law prevails with respect to those in whose name, after the death of their father there has been a *causæ probatio*, in accordance with the *lex Ælia Sentia* or the *senatus-consultum*; for if cause had been shown (*causa probata*) while the father was living, they would have been under his power.

(b) The first leaf of this book of the commentary, which includes from the first to the sixth section, has been effaced. Goeschen has supplied the missing text from the *Collatio legum Mos. et Rom. tit. xvi. s. 2*, with assistance from the *Institutes of Justinian*.

6. *Quod etiam de eo filio, qui ex prima secundave mancipatione post mortem patris manumittitur, intellegimus.*

6. We understand that this also applies to a son, who after the death of his father is manumitted by the first or second mancipation.

7. *Igitur cum filius filiae, et ex altero filio nepotes neptesve extant, pariter ad hereditatem vocantur; nec qui gradu proximior est ulteriorem excludit: æquum enim videbatur nepotes neptesve in patris sui locum portionemque succedere. Pari ratione et si nepos neptisve sit ex filio et ex nepote pronepos proneptisve, simul omnes vocantur ad hereditatem.*

7. When therefore there are surviving, a son or daughter, and grandsons or granddaughters by a second son, they are all equally called to the inheritance, nor does he who is of a nearer degree exclude one more remote; for it seemed equitable that grandsons and granddaughters should succeed to the place and share of their father. For a like reason, if there be a grandson or granddaughter born to a son, or a great-grandson or great-granddaughter born to a grandson, all are called to the inheritance.

JUST. iii. 1. 6.

8. Et quia placebat nepotes nepotesve, item pronepotes proneptesve in parentis sui locum succedere: conveniens esse visum est non in capita, sed in stirpes hereditates dividi, ita ut filius partem dimidiam hereditatis ferat, et ex altero filio duo pluresve nepotes alteram dimidiam: item si ex duobus filiis nepotes extent, et ex altero filio unus forte vel duo, ex altero tres aut quattuor ad unum aut ad duos dimidia pars pertineat, et ad tres aut quattuor altera dimidia.

JUST. iii. 1. 6.

9. Si nullus sit suorum heredum, tunc hereditas pertinet ex eadem lege XII tabularum ad adgnatos.

8. And because it was determined that grandsons or granddaughters, and also great-grandsons or great-granddaughters, should succeed in the place of their parents, it also seemed equitable that the inheritances should be divided, not among the heirs numerically (*in capita*), but by stocks (*in stirpes*); so that (in the case of two sons) one son should take his half share of the inheritance, and two or more grandsons by the other son should receive the remaining half. Again, if there are surviving grandsons by two sons; and one son have, say, one or two sons, and the other three or four; a half share belongs to the one or two grandchildren by the first son, and the remaining half to the three or four by the other son.

9. If there be no one as *suus heres*, the inheritance then belongs to the *agnati* by the same law of the Twelve Tables.

JUST. iii. 2. pr.

10. Vocantur autem agnati qui legitima cognatione juncti sunt: legitima autem cognatio est ea quæ per virilis sexus personas conjungitur. Itaque eodem patre nati fratres agnati sibi sunt, qui etiam consanguinei vocantur nec requiritur an etiam matrem eandem habuerint. (c) Item patruus fratris filio et invicem is illi agnatus est. Eodem numero sunt fratres patruales inter se, id est qui ex duobus fratribus progenerati sunt, quos plerique etiam consobrinus vocant. Qua ratione scilicet etiam ad plures gradus agnationis pervenire poterimus. (d)

JUST. iii. 2. 1.

10. Now those persons are called agnates who are connected by legal relationship (*legitima cognatio*) such legitima cognatio is that bond of relationship which is formed through persons of the male sex. Thus, brothers begotten by the same father are agnates to each other; these also are called *consanguinei*, nor need it be enquired whether they have the same mother. Again an uncle is an *agnatus* to his brother's son, and so also is the latter to his uncle. In the same class as mutually agnate are *fratres patruales*, i.e., sons of brothers; commonly called cousins. By following this scheme we may arrive at more degrees of agnatic relationship.

(c) Ulpianus says, "Post suos ab intestato legitimi admittuntur primum consanguinei. Ii sunt frater et soror qui in ejusdem potestate patris fuerunt, et si ex diversis matribus nati sunt. Consanguineos et adoptio facit et adrogatio et causæ probatio et in manum conventio." Mos. et Rom. Col. xvi. 6.

(d) The sections from 10 to 17, as may be inferred from the text, are very imperfect. They have been amended from the "Mosaicarum et Romanarum legum collatio," xvi. c. 2, which treats of legitimate succession; the title of the second chapter being, "Gaius institutionum libro iii. legitimas sic ordinat successiones;" from Gai. i. 156, and from other sources. See Gneist, note on page 153.

11. *Non tamen omnibus simul agnatis dat lex XII tabularum hereditatem, sed his qui tunc, cum certum est aliquem intestato decessisse, proximo gradu sunt.*

11. Yet the law of the Twelve Tables does not give the inheritance to all the agnates at the same time, but to those who are next in degree to the deceased at whatever time it is ascertained that he has died intestate.

JUST. iii. 2. 2.

12. *Nec in eo jure successio est: ideoque si agnatus proximus hereditatem omiserit, vel antequam adierit, decesserit, sequentibus nihil juris ex lege competit.*

12. There is by law no succession in this class of heirs. So that if the nearest agnate refuse the inheritance, or die before he has entered upon it, no right accrues by law to those next in order.

13. *Ideo autem non mortis tempore quis proximus sit requirimus, sed eo tempore quo certum fuerit aliquem intestatum decessisse, quia si quis testamento facto decesserit, melius esse visum est tunc ex iis requiri proximum, certum esse cœperit neminem ex eo testamento fore heredem.*

13. Thus we seek out, not for the agnatus who was next in degree at the time of death, but at the time when it was ascertained that the deceased died intestate; because if the man who dies has made a testament, it seems to be better to seek for the nearest of the agnate relations, only when it has been ascertained that no one will be heir by the testament.

14. Quod ad feminas tamen attinet, in hoc jure aliud in ipsarum hereditatibus capiendis placuit, aliud in ceterorum bonis ab his capiendis. Nam *feminarum hereditates* perinde ad nos agnationis jure redeunt atque masculorum: nostræ vero hereditates ad feminas ultra consanguineorum gradum non pertinent. Itaque soror fratri sororive legitima heres est; amita vero et *fratris filia legitima heres esse non potest*. *Sororis autem nobis loco est etiam mater aut noverca quæ per in manum conventionem aput patrem nostrum jura filiæ consecuta est.*

14. Yet so far as regards women, under this law one rule has been adopted with respect to our taking possession of their inheritances, and another with regard to their acquiring the property of any one else. For the inheritances of females legally revert to us by the law of agnation just as those of males; but our inheritances do not belong to women who are not within the degrees of consanguinity. Thus a sister is legal heir to a brother or sister; but a maternal aunt, and the daughter of a brother, cannot be our legal heir. A mother or step-mother, who, by a *conventio in manus* with our father, has attained the rights of a daughter, is classed as our sister.

JUST. iii. 2. 3.

15. Si ei qui defunctus erit sit frater et alterius fratris filius, sicut ex superioribus intellegitur, frater prior est, quia gradu præcedit. Sed alia facta est juris interpretatio inter suos heredes.

15. If the deceased have a brother and the son of another brother, it is understood from what we have written before, that the brother has the prior claim, because he is nearer by one degree. But a different interpretation of the law has been settled with regard to *sui heredes*.

16. Quodsi defuncti nullus frater extet, sed sint liberi fratrum, ad omnes quidem hereditas pertinet: sed quæsitum est, si dispari forte numero sint nati, ut ex uno unus vel duo, ex altero tres vel quattuor, utrum in stirpes dividenda sit hereditas, sicut inter suos heredes juris est an potius in capita. Jamdudum tamen placuit in capita dividendam esse hereditatem. Itaque quotquot erunt ab utraque parte personæ, in tot portiones hereditas dividetur, ita ut singuli singulas portiones ferant.

16. If, however, there is no brother of the deceased surviving him, though there are children of brothers, the inheritance indeed belongs to all; but the question arises, if the children should happen to be unequal in number—as when there are one or two sons of the one brother, and three or four sons of the other brother—should the inheritance be divided according to stocks (*stirpes*), as is the rule amongst *sui heredes*, or rather according to individuals (*capita*). Yet it was some time since determined that the inheritance should be divided according to individuals. And thus the inheritance would be divided into as

JUST. iii. 2. 4.

many portions as there shall be persons in both sections together, so that all take a share apiece.

17. Si nullus agnatus sit, eadem lex XII tabularum gentiles ad hereditatem vocat. Qui sint autem gentiles, primo commentario rettulimus. Et cum illic admonuerimus totum gentilicium jus in desuetudinem abisse, supervacuum est hoc quoque loco de ea re curiosius tractare. (e)

17. If there is no agnatus, the same law of the Twelve Tables calls the *gentiles* to the inheritance. Now we have explained in the first commentary who are denoted by the term *gentiles*, and since we there stated that all the *gentilician* law has passed out of use, it is unnecessary in this place to treat upon the point more fully.

(e) Gaius in considering the subject of intestate succession directs attention to the ancient *jus civile* and to the emendations introduced by the edicts of the prætors in accordance with the principles of the *jus gentium*. Living probably more than two centuries before the legislation of Justinian, his commentaries of course do not touch the reforms and alterations made by the later constitutions of the emperor, recorded in the *Novellæ*, 118 and 127. The different periods of the law relating to intestate succession are deserving the most careful consideration. In ancient Rome the succession to the property of an intestate, or the *successio legitima*, as it is called, was regulated entirely by the *jus civile* and admitted of no interference on the part of the prætors. It was built entirely upon the principles of *agnation*, extending that principle so as to include the *gentiles*. Hence, if the family bond were broken even by the “*minima capitis deminutio*,” the right of succession in that familia was utterly destroyed. Mere cognation or blood relationship as such gave no right whatever to succeed to the estate of an intestate. Thus, in ancient Rome the succession *ex jure civili* was regulated as follows:—First came the *sui heredes* of the deceased *ingenuus* male ascendant without respect to sex or to the degree of relationship. These *sui* are not to be regarded strictly speaking as succeeding to the

paternal inheritance, for the law presupposed that they retained the estate of the defunctus as his heirs, without any legal succession. Secondly, if there were no *sui heredes* to continue in the property of the defunctus, the inheritance descended to the "proximus agnatus," and when there were several of the same degree they inherited not singly but together. Originally there was no distinction of sex made, but a limitation was introduced at an early period, which permitted women to be called only as *consanguineæ*. The vestal virgins could not inherit *ab intestato*. Thirdly, when there were no agnates the gentiles were called to the inheritance. The term "gentiles" was applied to persons united together by a common name. It was from the "gentes" that the "curiæ" were originally formed. The different members of a gens were united together by common religious observances, and they enjoyed certain mutual rights; especially were they privileged by possessing the right of inheritance to an intestate after the agnates, as Gaius observes, in accordance with the enactment of the law of the Twelve Tables. Cicero says, "Gentiles sunt, qui inter se eodem nomine sunt. Non est satis. Qui ab ingenuis oriundi sunt. Ne id quidem satis est. Quorum majorum nemo servitutem servivit. Abest etiam nunc. Qui capite non sunt deminuti. Hoc fortasse satis est." Top. c. 6. Ulpianus, giving an account of the law as it was in his time, says, "Intestatorum ingenuorum hereditates pertinent primum ad suos heredes, id est liberos, qui in potestate sunt, ceterosque, qui liberorum loco sunt. Si sui heredes non sunt, ad consanguineos, id est fratres et sorores ex eodem patre. Si nec hi sunt, ad reliquos agnatos proximos, id est, cognatos virilis sexus, per mares descendentes, ejusdem familiæ. Id enim cautum est lege duodecim tabularum hac: 'si intestato moritur, cui suus heres nec escit, agnatus proximus familiam habeto.' Ad feminas ultra consanguineorum gradum legitima hereditas non pertinet. Itaque soror fratri sororive legitima heres fit." Tit. xxvi. secs. 1 et 6. For the alterations made by the prætors, see the

note to sec. 32 of this book ; Paul. Sent. IV. 8. s. 1. 22, 23 ; Ulp. in Coll. 44. Mos. et R. xvi. 4. l. 195. s. 1. Dig. de V. S. (50. 16). The *sui* divided the inheritance among themselves according to *stirpes* or branches, but these branches again divided among themselves *per capita*. The *consanguinei* and the *agnates* divided the property between them *per capita*. For the alteration made by the senatus-consultum Tertullianum passed in the reign of Hadrian, in regard to the “*jus trium vel quatuor liberorum*,” and by the senatus-consultum Orphitianum under Marcus and Commodus, in favour of children claiming the inheritance of their mother, see notes to sec. 24.

18. Hactenus lege XII tabularum finitæ sunt intestatorum hereditates : quod jus quemadmodum strictum fuerit, palam est intelligere.

19. Statim enim emancipati liberi nullum jus in hereditatem parentis ex ea lege habent, cum desierint sui heredes esse.

20. Idem juris est, si ideo liberi non sint in potestate patris, quia sint cum eo civitate Romano donati, nec ab Imperatore in potestate redacti fuerint.

21. Item agnati capite diminuti non admittuntur ex ea lege ad hereditatem, quia nomen agnationis capitis deminutione perimitur.

22. Item proximo agnato non adeunte hereditatem, nihilo magis sequens jure legitimo admittitur.

18. Thus far, the rights of succession to intestates are limited by the law of the Twelve Tables, and how rigid this law has been, is clearly to be understood.

19. For as soon as children are emancipated they have, by this law, no right to the inheritance of their *parentes*, since they have ceased to be *sui heredes*.

20. The same rule of law prevails if children are not under the potestas of their father, because they have received the Roman citizenship at the same time with their father, but have not been placed under his potestas by the emperor.

21. Also agnates who have suffered a *capitis deminutio*, are by this law not admissible to the inheritance, because all that is denoted by agnation is lost through this *capitis deminutio*.

22. Also though the nearest agnate does not enter upon the inheritance, the next in legal order of succession is certainly not admitted.

23. Item feminæ agnatæ quæcumque consanguineorum gradum excedunt, nihil juris ex lege habent.

23. Also women related as agnates who are beyond the degrees of consanguinity have no rights by this law.

24. Similiter non admittuntur cognati qui per feminini sexus personas necessitudine junguntur; adeo quidem, ut nec inter matrem et filium filiamve ultro citroque hereditatis capiendæ jus competat, præter quam si per in manum conventionem consanguinitatis jura inter eos constiterint. (f)

24. In like manner cognates who are joined in relationship through persons of the female sex, are not admitted; so that even between the mother and the son or daughter there does not arise either on the one part or the other any right entitling to the possession of the inheritance, unless the rights of consanguinity exist between them through a *conventio in manum*.

(f) The *senatus-consultum Tertullianum*, passed A.D. 158, permitted a mother—but not the grandmother—having three or four children, according as she was an *ingenua* or *liberta* to obtain the succession to her children when the latter died intestate without issue, and when their father was not living, or did not think fit to claim the inheritance. The consanguine brother of a son or of a daughter, excluded the mother; but the consanguine sister was allowed to succeed with the mother. Tit. Dig. ad S. C. Tertull. (38. 17) l. 34. Dig. ad S. C. Trebell. (36. 1). “Ex Tertulliano *senatus-consulto* ut succedat mater filio ab intestato quatuor requiruntur, scilicet quod ea sit mater, et quod filius decedat pubes, alioquin si impubes, nec intra annum ipsa mater tutorem petierit, excluditur tertio quod ab intestato decedat ipse impubes, quod filius decedens non habet filios, nec descendentes, etc.” Daoyz sub voce “Tertulliano,” pars ii. p. 618*b*. The *senatus-consultum Trebellianum* was an invasion of the agnatic principle, but not the earliest invasion. The *lex Julia et Papia Poppæa* had already broken through that principle when the agnates were either celibates or childless persons. Constantine extended the principle of the *senatus-consultum Tertullianum* still further, allowing the mother without the *liberi* to take one-third of the

child's property; Valentinian allowed her to take two-thirds; Justinian the whole, but in conjunction with the brothers and sisters of the intestate. Justinian says, "Et primus quidem divus Claudius matri ad solatium liberorum amissionum legitimam eorum detulit hereditatem." By the senatus-consultum Orphitianum, passed A. D. 178, twenty years after the senatus-consultum Tertullianum, children were preferred before all the agnates in intestate succession to their mother if she were not *in manus*; and by a later constitution the privilege of succession was extended to the maternal ascendants. Justinian says that a *spurius* shall not be entitled with the legitimate children (*justis liberis*) to receive anything from an "industriis mater," and he adds because "in mulieribus ingenuis et in industriis castitatis observatio præcipuum debitum est." Boecking's Instit. p. 268. Instit. de S. C. Tertull. (3. 3.) Instit. de S. C. Orphit. (3. 4.) Domenget in loco. l. 5. Cod. ad S. C. Orphit. (6. 57.) l. 11. Cod. de suis (6. 55.) Nov. 18. c. 4. et legit. lib. et ex fil. etc. Gneist says that Gaius makes no mention in this place of the senatus-consultum Orphitianum and Tertullianum. See Ulp. Frag. xxvi, 7. 8. In l. 9. Dig. ad S. C. Trebell. (36. 1), the Florentine MSS. of the Digest, which possesses the highest authority, has the following inscription: "Gaius libro singulari ad S. C. Orfitianum," but the extract seems to be taken from Paulus lib. sig. ad hoc S. C. The same remarks apply in regard to the inscription in the Codex Florentinus in l. 8. Dig. eod. "Gaius libro singulari ad S. C. Tertullianum."

25. Sed hæc juris iniquitates edicto Prætoris emendatæ sunt.

25. But the want of equity in this law was remedied by the edict of the Prætor.

26. Nam *liberos* omnes qui legitimo jure deficiuntur vocat ad hereditatem proinde ac si in potestate parentum mortis tempore fuissent, sive soli sint sive etiam sui heredes,

26. For all those children who are deprived by this rule of law, he calls to the inheritance just as if they had been under the *potestas* of their agnate ascendant at the time of his death;

id est qui in potestate patris fuerunt, concurrant.

and this either by themselves or conjointly with the *sui heredes*, i.e., those who were actually under the power of their father.

JUST. iii. 5. pr.

27. Adgnatos autum capite deminutos non secundo gradu post suos heredes vocat, id est non eo gradu vocat quo per legem vocarentur, si capite minuti non essent; sed tertio, proximitatis nomine: licet enim capitis deminutione jus legitimum perdidierint, certe cognationis jura retinent. (g) Itaque si quis alius sit qui integrum jus agnationis habebit, is potior erit, etiam si longiore gradu fuerit.

27. But he does not call to the inheritance in the second degree immediately after the *sui heredes*, those agnates who have suffered a *capitis deminutio*; i.e., he does not call them to that rank to which they would be called by the law if there had not been a *capitis deminutio*, but to the third degree by reason of their nearness of relationship; for although by the *capitis deminutio* they have lost their legal claim, they retain their rights of cognate relationship. So if there be any other person whose agnatic right is complete, he will have a stronger claim, even though he be more remote in degree.

JUST. iii. 5. 1.

(g) We have already explained what the Romans understood by the term agnation. See note to section 156. bk. i. By the term *cognation* we are to understand blood relationship. *Cognatio naturalis* was applied to the relation subsisting between several persons on account of oneness of blood, this might be an *immediate* derivation when it was said to be *superior*, or *mediate*, in which case it was said to be *inferior*. Thus cognation might arise from having either a common father or a common mother. *Cognatio civilis* was applied to the relationship subsisting between adopted children with the pater adoptans, and also to agnate relationship. Paulus says, "Nomen cognationis a græce voce dictum videtur; συγγενεῖς enim illi vocant quos nos cognatos appellamus." Speaking of the distinction between the terms agnate and cognate, he says, "Inter agnatos igitur et cognatos hoc interest, quod inter genus et speciem; nam qui est agnatus, et cognatus est, non utique autem qui cognatus

est, et agnatus est; alterum enim civile, alterum naturale nomen est. Cognationis origo et per feminas solas contingit; frater enim est et qui ex eadem matre tantum natus est; nam qui eundem patrem habent, licet diversas matres, etiam agnati sunt." 1. 10. secs. 1. 4. 5. 6. Dig. de grad. et affin. (38. 10). Again, Modestinus with his usual care and exactness explains the Roman idea of cognatio. He says, "Cognationis substantia bifariam apud Romanos intelligitur. Nam quædam cognationes *jure civili* quædam *naturali* connectuntur; nonnunquam utroque jure concurrente, et naturali, et civili, copulatur cognatio. Et quidem *naturalis cognatio* per se sine civili cognatione intelligitur, quæ *per feminam* descendit quæ vulgo liberos peperit. *Civilis* autem per se, quæ etiam *legitima* dicitur, sine jure naturali cognatio consistit per adoptionem. Utroque jure consistit *cognatio* cum justis nuptiis contractis copulatur. 1. 4. sec. 2. tit. cit. (38. 10). Taking any one person from which to view natural relationship, it branches out into ascendants and descendants. Such relationship is called the *linea recta*. Again, two or several persons may trace their pedigree to a third person as their common ancestor, in which case the relationship is termed collateral and the line is termed the *linea transversa*. Nearness of affinity is always determined by degrees; and the rule in Roman law is that every *conception* makes a degree. Hence the maxim: "Tot gradus, quot generationes." The calculation of degrees of relationship in the Canon law, *in the case of collaterals*, is exceedingly simple when the maxim of the Roman law just cited is borne in mind. It is the following: In that degree in which persons belonging to a collateral line are related to a common ancestor, in that same degree are they related to each other; but if one person is in a more remote degree than another, then this degree is to be taken as the degree of relationship subsisting between such collaterals. To make this plain, A is *four* degrees from X the common ancestor, and B is also *four* degrees, then by the Canon law A is in the fourth degree from B. Again, A is *five* degrees from

X the common ancestor, and B is *four*; then A is in the fifth degree—not the fourth—from B, for the greater degree fixes the relationship. Collaterals are either related by an affinity derived from the same pair, in which case they are said to be *germani*, or they are related by the half blood. If they had a common father they were said to be *consanguinei*, if a common mother, *uterini*. As we have already seen, if the family bond were traced only through males, born in wedlock, persons thus related were termed agnates. When two persons related to each other marry, or when two persons related to a third person marry, or when two persons united by natural and civil relationship marry, and have children, the children are said to be related by a manifold relationship. See Moehler Pand. pp. 18, 19. Articles “Consanguineus,” “Germanus” and “Uterinus” in Hermann’s Handlexicon, and Brissonius.

28. Idem juris est, ut quidam, putant, in ejus agnati persona, qui proximo agnato omittente hereditatem, nihilo magis jure legitimo admittitur. Sed sunt qui putant hunc eodem gradu a Prætore vocari, quo etiam per legem agnatis hereditas datur.

29. Feminae certe agnatæ quæ consanguineorum gradum excedunt tertio gradu vocantur, id est si neque suus heres neque agnatus ullus erit.

30. Eodem gradu vocantur etiam eæ personæ quæ per feminini sexus personas copulatæ sunt.

31. Liberi quoque qui in adoptivæ familia sunt ad naturalium parentum hereditatem hoc eodem gradu vocantur.

28. The same rule of law applies, as some think, in the case of that agnate who, though the nearest agnatic kinsman declines the inheritance, has not on that account a better right to admission. There are some who think that this man is called by the Prætor to the same degree as that in which the hereditas is given to the agnates by operation of law.

29. Moreover, female agnates who are outside the class of *consanguineæ* are called to the inheritance in the third degree; when there is neither a suus heres nor any male agnate.

30. And in the same degree are called those women who are related through persons of the female sex.

31. Children also who belong to an adoptive family are called to the inheritance of their natural parents in the same (the third) degree.

32. Quos autem Prætor vocat ad hereditatem, hi heredes ipso quidem jure non fiunt. Nam Prætor heredes facere non potest: per legem enim tantum vel similem juris constitutionem heredes fiunt, veluti per senatus-consultum et constitutionem principalem: sed eis si quidem Prætor det bonorum possessionem, loco heredum constituuntur. (h)

32. But those whom the prætor calls to the inheritance do not become heirs by the *jus civile*; since the prætor cannot make heirs. For persons become heirs only by the *jus civile*, or by a constitution in the nature of a law such as a senatus-consultum and an imperial constitution. But those to whom the Prætor grants possession of the property (*bonorum possessio*) are accounted in the place of heirs.

(h) In section 17 of this book, attention has been called to the succession to the property of an intestate *ex jure civili*. The present note will therefore be confined to an explanation of the changes made by the prætors, and subsequently by the 118th and the 127th Novellæ of Justinian, in the law of intestate succession. The great strictness of the ancient *jus civile* was mitigated as Rome grew in wealth and became enlarged in her ideas of right and of justice. Hence in the course of time the prætors, proceeding upon the basis of the *jus gentium*, introduced an entirely new series of rules by which the succession to the estate of an intestate was to be regulated. The prætors could not grant the hereditas, but they gave the “bonorum possessio” either *cum re* or *sine re*, and the person thus empowered obtained the property of the defunctus, not as heres, but as bonorum possessor. He was said to be “in heredis loco,” and held the property he acquired by bonitarian ownership, which might be ripened by usucapio into a quiritarian holding. The obligations of the defunctus, both active and passive, were transferred to the bonorum possessor, who was able to defend his possession by the important prætorian action, denominated the “interdictum quorum bonorum.” See notes, book ii. secs. 97, 135. As already stated, it was not till the end of republican Rome that this new mode of succession came into operation. The persons and the order in which persons were called by the prætor to the intestate succession, were as follows. First, were

called the “unde liberi,” which comprised, not only the sui, but all the descendentes. The term “unde liberi,” included both sui and emancipated children. Hence, in the first class, the prætor called to the succession all those who would have been sui, if no “capitis deminutio” had taken place. Secondly, the next class was composed of the “unde legitimi,” who stood in the place of the agnates, under the *jus civile*. Thirdly, the “unde cognati,” a term which included all blood relations who were called “secundum ordinem.” The most remote agnate of the intestate, excluded the nearest cognate. Blood relationship was recognized, but all claim to the estate arising out of it was held in strict subordination to that arising from agnation. The fourth class was that of the “unde vir et uxor.” Dig. unde vir et uxor (38. 11). Cod. unde vir et uxor (6. 18). Sometimes these four principal classes are increased as in the following list to seven. Thus Puchta says that the prætor called seven classes, and he enumerates them as follows:—

1. Bonorum possessio unde liberi.
2. Bonorum possessio unde legitimi.
3. Bonorum possessio unde proximi cognati (proximitatis nomine).
4. Bonorum possessio tum quem (or tanquam) ex familia.
5. Patronus, patrona, liberi et parentes patroni patronave.
6. Unde vir et uxor.
7. Unde cognati manumissoris. Instit. vol. iii. sec. pp. 283. 288.

At the time of the Emperor Theodosius an idea gained ground that blood relationship or cognation should be preferred to agnation; and that in the succession to an intestate the *cognati* ought to prevail over the *agnati*. But strong as the conviction was, no alteration was allowed to be made, and the principle of agnation continued dominant until the time of Justinian. Before this period the cognati were admitted only sporadically, that is, as it were, here and there. It was not till the passing of the 118th Novella, A.D. 543, that a foundation was laid for the intestate succession of

the later law of Rome. The 127th Novella, passed in the year 547, A.D., was an appendix to the previous imperial law : so that the two Novellæ should be considered together. Both these enactments are still law in those lands in which the Roman law prevails, and they also furnish the basis upon which the English law for the distribution of the personal property of an intestate is modelled. The fundamental principle in the Justinian law as contained in these Novellæ, is the following : That blood relationship or cognatio shall have precisely a similar position and claim as agnatio. It is common for some jurists to affirm that Justinian abolished the agnatic principle and that he put cognatio in its placé. Such an assertion is quite erroneous. If the agnatic principle had been utterly cashiered, as it is sometimes said, a person who was a mere agnate would have had no right to the estate of the intestate. But it was not so. An adopted son who was only an agnate of the defunctus and no blood relation, at least not necessarily so, had as good a right to the succession as any cognate. Hence it is manifest that the agnatic principle was not discarded. The fundamental principle established by Justinian was this ;—that *relationship* (and whether it arose from agnation or cognation made no difference) was henceforth the basis for the new law of succession. Hereditas and Bonorum possessio, using those terms in their strictly technical signification, were no longer regarded as valid, but there arose an entirely new and civil succession. Not that all relations succeeded indifferently, for there were the following orders and classes. 1. All descendentes were entitled. 2. All ascendentes of the full blood, as brothers and sisters, and nephews of the full blood 3. The brothers and sisters of the defunctus of the half-blood, and his nephews of the half blood 4. All those not included in the previous classes. The latter succeeded according to their nearness of degree. The following lines are commonly employed as a *memoria technica* to impress these rules of descent.

1. Descendens omnis succedit id ordine primo.

2. Ascendens propior, germanus filius ejus.

3. Tunc latere ex uno frater, quoque filius ejus.

Hi cuncti (not juncti) in stirpes succedunt; in capita autem.

Juncti ascendentes, fratrum proles quoque sola.

Cognatusque heres quem continet ultima classis.

4. Denique proximior reliquorum quisque superstes.

The interpolated lines between the third and fourth classes give the rules for the succession *per stirpem* and *per capita*.

In the first class then there succeeded all the descendants of the defunctus, so far as their quality of descent was acknowledged. Not merely the liberi, nor merely the sui, but all the agnate descendants of the wife: the children of the wife and the children of a daughter. If a man die and leave illegitimate children, they do not succeed, as “Pater est quem nuptiæ demonstrant.” Nor was there any difference made as to nearness of grade, for the more remote succeeded also with the nearer. The former were only excluded by their parents: for example, a defunctus having left a son, the son of a deceased daughter, and a grandson to a son who is living. How is the succession to be regulated? In this case the sons of the defunctus and the son of his daughter would be called; the latter succeeding “in loco parentis defunctæ.” The grandson whose parent was living was excluded by his father. When there are several descendentes they succeed according to stirpes or stems children taking the share of the deceased parent.

In the second class—the ascendentes—all the heirs entitled succeed together, and with them the brothers and sisters of the whole blood, the “germani,” and the sons and daughters of brothers and sisters—nephews and nieces of the whole blood—but not the grand nephews and nieces. The uncle and aunt also succeeded in the second class; but *consobrini* and *consobrinæ*—sisters’ children—succeeded in the fourth and not in the second class. By the 118th Novella nephews had a concurrent right with brothers and sisters,

but they were excluded if there were any ascendants. The 127th Novella altered this, and gave them a right to succeed in the second class, and that even when there were ascendants such as parents. “Hæc igitur juste emendantessancimus, si quis moriens reliquerit quendam ex ascendentibus, et fratres, qui cum parentibus vocari possint, alteriusque fratris præmortui liberos, ut cum ascendentibus et fratribus prædefuncti etiam fratris liberi vocentur, et tantam partem accipiant, quantam pater ipsorum accepturus fuisset, si viveret. Hæc autem de illis fratrum liberis sancimus, quorum pater ex utroque parente defuncto junctus erat; et, ut brevi dicamus, quem locum illis dedimus, quando cum solis fratribus vocantur, eum quoque illos habere volumus, quando cum fratribus quidam ex ascendentibus ad hereditatem vocantur.” Nov. 127. cap. 1.

In the first class, as we have already stated, the nearer grade excluded the more remote, and this not only in the same line, but also in different ones. Thus the father excluded both the paternal grandparents, and also the maternal. When several of the same degree are entitled it must be ascertained whether they succeed alone or with nephews and others. If they succeed with others, the succession is *in capite*; but if they are alone, there being no brothers, sisters, or nephews, then the succession is in lines; the inheritance being divided into halves, one half going to the paternal line and the other to the maternal.

It does not admit of any doubt that in the second class all brothers and sisters succeeded *in capite*. In the third class, when nephews succeeded with brothers and sisters, or with parents, or with consobrini, they always divided the inheritance in stirpes. In the fourth class, the succession was always *in capite*. Nov. 118. Scheurl. Instit. s. 203.

33. *Adhuc autem alios etiam complures gradus Prætor facit in bonorum possessione danda, dum id agit, ne quis sine successore moriatur. De quibus in his commentariis copiose*

33. Up to the present time the prætor also acknowledges many other degrees of relationship in granting the *bonorum possessio*; and this is done, that no one may die without

non agimus ideo, quia hoc jus totum propriis commentariis quoque alias explicavimus. Hoc solum admonuisse sufficit . . .

a successor. Concerning these points we do not so fully treat in these commentaries, because we have elsewhere explained this entire legal institute in special commentaries. It is sufficient here simply to note. . . .

[A lacuna of 36 lines occurs here.]

34. *Aliquando tamen neque emendandi neque impugnandi veteris juris, sed magis confirmandi gratia pollicetur bonorum possessionem. Nam illis quoque qui recte facto testamento heredes instituti sunt dat secundum tabulas bonorum possessionem: item ab intestato suos heredes et agnatos ad bonorum possessionem vocat. Quibus casibus beneficium ejus in eo solo videtur aliquam utilitatem habere, quod is qui ita bonorum possessionem petit, interdicto cujus principium est QUORUM BONORUM uti possit. Cujus interdicti quæ sit utilitas, suo loco proponemus. Alioquin remota quoque bonorum possessione ad eos hereditas pertinet jure civili.*

34. Yet the prætor sometimes promises the *bonorum possessio*, not for the sake of amending or impugning the old law, but rather for confirming it. For he gives the *bonorum possessio* in accordance with the words of the will (*secundum tabulas*), to those also who have been instituted heirs in a testament legally made. Again he calls to the possession of the property in a case of intestacy, the *sui heredes* and the agnates. In which cases his grant appears to be of advantage in this respect only; that he who thus seeks the possession of the property, may avail himself of the interdict which begins, "Of what property soever" (*quorum bonorum*). We shall explain in the proper place what is the advantage of this interdict. In all other respects the rights of succession belong to them by the civil law (*jus civile*), without the operation of the *bonorum possessio*.

35. *Ceterum sæpe quibusdam ita datur bonorum possessio, ut is cui data sit, non optineat hereditatem: quæ bonorum possessio dicitur sine re. (i)*

35. But the *bonorum possessio* is often so given that he to whom it is granted does not obtain the enjoyment of the inheritance. This is called the *possessio bonorum, sine re*.

(i) For an account of the *bonorum possessio* see the note to section 119 of the second book: see also the close of that note for the distinction between possession *cum re*, and *sine re*. When the *bonorum possessio* was given *cum re*, the *bonorum* possessor came into the enjoyment of the property.

We see from the text that the *bonorum possessio* might be sometimes given *sine re*. In section 120 of the second book we learn, that from a rescript of the emperor Antoninus, the *bonorum possessor* was, under certain circumstances, authorized to maintain the possession even against the legitimate heir. In sections 148, 149 of the second book we are informed under what circumstances the *bonorum possessio* was given *cum re*; namely, when there was no other person entitled to claim the hereditas. The next and the following sections of the present book will furnish further illustrations of this subject.

36. *Nam si verbi gratia jure facto testamento heres institutus creverit hereditatem, sed bonorum possessionem secundum tabulas testamenti petere noluerit, contentus eo, quod jure civili heres sit, nihilo minus ii qui nullo facto testamento ad intestati bona vocantur possunt petere bonorum possessionem: sed sine re ad eos hereditas pertinet, cum testamento scriptus heres evincere hereditatem possit.*

37. *Idem juris est, si intestato aliquo mortuo suus heres noluerit petere bonorum possessionem, contentus legitimo jure. Nam et agnato competit quidem bonorum possessio, sed sine re, cum evinci hereditas ab suo herede potest. Et illud convenienter, si ad agnatum jure civili pertinet hereditas et hic adierit hereditatem, sed bonorum possessionem petere noluerit, et si quis ex proximis cognatus petierit, sine re habebit bonorum possessionem propter eandem rationem.*

36. For if, to take an illustration, the instituted heir of a legally made testament has duly entered upon the hereditas, but is unwilling to seek for the possession of the property *secundum tabulas*, being satisfied that he is heir by the civil law (*jus civile*): nevertheless those who are called to the possession when there has been no testament made, can sue for the *bonorum possessio*; but the inheritance belongs to them *sine re*, when the heir appointed by the testament can recover the inheritance.

37. The same rule of law prevails, if after the death of any one intestate, the *suius heres*, satisfied with his legal right, is unwilling to sue for the possession of the property. For then also the *bonorum possessio* accrues to the agnate, but *sine re*, since the inheritance can be recovered by the *suius heres*. The same thing fitly happens, if by the *jus civile* the inheritance belongs to an agnate, and he has entered upon it, but is unwilling to sue out the *bonorum possessio*; then if anyone of the nearest cognates will sue for it, he shall for the same reason have the *bonorum possessio sine re*.

38. Sunt et alii quidam similes casus, quorum aliquos superiore commentario tradidimus.

38. There are also certain other similar cases, some of which we have treated of in our former commentary.

DE SUCCESSIONE LIBERTORUM.

ON THE SUCCESSION OF FREED-MEN.

39. Nunc de libertorum bonis videamus. (i)

39. Now let us see how the property of freedmen descends.

JUST. iii. 7. pr.

(j) The prætor adjudged to children whom the father had omitted to mention in his testament the bonorum possessio "contra tabulas." He also called to the succession the emancipated children of an intestate person, permitting them to share with the *sui heredes*. Such a succession was a departure from the strict *jus civile*. The prætor also called to the succession the following classes of persons :

1. Unde decem personæ.
2. Tum quem ex familia.
3. Unde liberi patroni patronæve et parentes eorum.
4. Unde cognati manumissoris.

In the first class, or the "decem personæ," the persons preferred were the following :—the father and mother ; the grandfather and grandmother, both paternal and maternal ; the son and daughter ; the grandson and granddaughter ; the children of a son and daughter whether consanguine or uterine. Instit. s. 7. de bon. pos. Domenget iii. 39. 41.

40. Olim itaque licebat liberto patronum suum in testamento præterire : nam ita demum lex XII tabularum ad hereditatem liberti vocabat patronum, si intestatus mortuus esset libertus nullo suo herede relicto. Itaque intestato quoque mortuo liberto, si is suum heredem reliquerat, nihil in bonis ejus patrono juris erat. Et si quidem ex naturalibus liberis aliquem suum heredem reliquisset,

40. A freed-man was formerly permitted to pass over his patron in making his will. For the law of the Twelve Tables called the patron to the succession of a freed-man only when the freed-man had died intestate leaving no one as his *suus heres*. And thus also if a freed-man, having died intestate, left a *suus heres*, the patron had no legal claim against his estate. If he had indeed left any-

nulla videbatur esse querela; si vero vel adoptivus filius filiave, vel uxor quæ in manu esset sua heres esset, aperte iniquum erat nihil juris patrono superesse.

JUST. iii. 7. pr.

41. Qua de causa postea Prætoris edicto hæc juris iniquitas emendata est. Sive enim faciat testamentum libertus, jubetur ita testari, ut patrono suo partem dimidiam bonorum suorum relinquat; et si aut nihil aut minus quam partem dimidiam reliquerit, datur patrono contra tabulas testamenti partis dimidiæ bonorum possessio. Si vero intestatus moriatur, suo herede relicto adoptivo filio, vel uxore quæ in manu ipsius esset, vel nuru quæ in manu filii ejus fuerit, datur æque patrono adversus hos suos heredes partis dimidiæ bonorum possessio. Prosunt autem liberto ad excludendum patronum naturales liberi, non solum quos in potestate mortis tempore habet, sed etiam emancipati et in adoptionem dati, si modo aliqua ex parte heredes scripti sint, aut præteriti contra tabulas testamenti bonorum possessionem ex edicto petierint: nam exheredati nullo modo repellunt patronum.

JUST. iii. 7. 1.

42. Postea lege Papia aucta sunt jura patronorum quod ad locupletiores libertos pertinet. (k) Cantum est enim ea lege, ut ex bonis ejus qui

one of his own children as heir, there appeared to be no ground of complaint, but if he had left as his heir an adopted son or daughter, or a wife who was in manus, it was clearly inequitable that no right should survive to the patron.

41. On which account, by a decree of the prætor this want of equity was afterwards corrected. For it was enacted that if a freed-man made a will, he should so devise his property as to leave one-half of it to his patron. And if he devised nothing, or less than one-half, the possession of one-half share of the property was, in opposition to the words of the will (*contra tabulas*), given to the patron. But if he died intestate, leaving as his *surus heres* an adopted son or a wife who was in manus to him, or a daughter-in-law who was in the manus of his son, the possession of one-half share of the property was in like manner given to the patron in opposition to these *sui heredes*. Now all natural children are of benefit to a freed-man in the exclusion of a patron; not only those whom he has under his power at the time of his death, but also those emancipated and those given in adoption; provided only they are appointed heirs to some portion of the estate, or if, being passed over, they have in accordance with the edict sued for the *bonorum possessio* against the words of the testament (*contra tabulas*); those however who have been expressly disinherited do in no way exclude the patron.

42. Afterwards, by the lex Papia the rights of patrons were increased so far as related to the more wealthy freed-men. For it was provided by

sestertiorum nummorum centum milium plurisve patrimonium reliquerit, et pauciores quam tres liberos habebit, sive is testamento facto sive intestato mortuus erit, virilis pars patrono debeatur. Itaque cum unum filium unamve filiam heredem reliquerit libertus, perinde pars dimidia patrono debetur, *ac si sine ullo filio filiave moreretur*; cum vero duos dasve heredes reliquerit, tertia pars debetur; si tres relinquat, repellitur patronus. [Linea vacua].

JUST. iii. 7. 2.

the same lex that the patron should be entitled to a virile part of the property of a freed-man who has left a patrimony of 100,000 sesterces or more, and has fewer than three children, whether he has made a will or died intestate. Thus when the freed-man has left one son or one daughter as his heir, the half share is due to the patron just as if there were no son or daughter; but when he has left two, either sons or daughters, one-third part is due to the patron; if three are left the patron is excluded.

(k) The lex Papia Poppæa ordained that the manumissus should leave something to his patron if he had a fortune of not less than 100,000 sesterces, nor less than three children. Justinian abolished all distinction of sex, and enacted that the claim of the patrona should be the same as that of the patronus. He also declared that the liberta should have the same position as the libertus. Domenget says that the sum mentioned in the text was equivalent to about 19,000 francs or £760 pounds sterling. A sesterce was about 19 centimes, or 1·94 pence. Justinian ordained that the succession to a freed man *ab intestato* should be as follows: First, the children of the libertus, whether under the potestas or not; and also those born before he was manumitted. Secondly, the patron and his descendants, and when these failed, the collaterals of the patron to the fifth degree. When the libertus had children he was permitted to make a testament and dispose of his property as he pleased. If he had no children, he could only make a will provided his estate was under 100 aurei; if it exceeded this, he was bound to leave his patron one-third of his property. When he did not do so, the patron could claim it *contra tabulas*. Domenget in loco. Instit. s. 3. de succes. lib. (2. 7.) and the note in Sandars' Edit. of the Institutes.

43. In bonis libertinarum nullam injuriam antiquo jure patiebantur

43. In respect of the goods of freed-women, the patrons suffered no

patroni. Cum enim hæc in patronorum legitima tutela essent, non aliter scilicet testamentum facere poterant quam patrono auctore. Itaque sive auctor ad testamentum faciendum factus erat, *neque tantum quantum vellet, testamento sibi relictum erat, de se queri debebat, qui id a liberta impetrare potuerat. Si vero auctor ei factus non erat, etiam tutius hereditatem morte (l) ejus capiebat; nam neque suum heredem liberta relinquebat qui posset patronum a bonis ejus vindicandis repellere*

injustice under the ancient law. For when women were under the legal guardianship of their patrons they were not able to make a will except by the authority of the patron (*patrono auctore.*) Therefore, any ground of complaint was against himself only if he had been appointed *auctor* for the purpose of making the will, and so much was not bequeathed to him as he desired, since he could have obtained this from the freed-woman. But if he had not been appointed *auctor* for such a purpose, he took the inheritance even more securely on her death, for a freed-woman cannot leave a *suus heres* who can exclude the patron from claiming her property by *vindicatio*.

(l) Huschke suggested that the lacunæ in this section, judging from the context and the marks legible in the MS., may be filled up as in the text: "Itaque sive, etc." Ulpianus, speaking of the patron's rights, says, "Itaque seu intestata moriatur liberta, semper ad eum hereditas pertinet; licet liberi sint libertæ, (qui) quoniam non sunt sui heredes matri; (non) obstant patrono." xxix. 2.

44. Sed postea lex Papia cum quattuor liberorum jure libertinus tutela patronorum liberaret, et eo modo inferret ut jam sine patroni tutoris auctoritate testari possent, prospexit, ut pro numero liberorum quos superstites liberta habuerit virilis pars patrono debeatur . . . ex bonis ejus, quæ omnia juris ad patronum pertinet. (m)

[Dux lincæ vacua:.]

44. But afterwards, the lex Papia having exonerated freed-women who had borne four children, from the tutela of their patrons, and in that manner secured them the power of making a will without the authority of their patron as tutor; further provided, that there should be due to the patron a virile part computed according to the number of the surviving children of the freed-woman: . . . from her property, all which . . . of right belong to the patron.

(m) Huschke says that Goeschen has filled up the first larger lacunæ in a manner satisfactory to the sense. With regard to the words “virilis pars patrono debeatur . . . ex bonis ejus, quæ omnia,” comparison with sec. 47 proves that “ex bonis ejus” belongs to “debeatur;” hence it must have stood in the MS. “debeatur c. tab. (contra tabulas) ex bonis ejus.” Gaius appears afterwards to have said that all the hitherto specified legitimate portions due from the patron to one who has not suffered capitis deminutio are independent of the patron or of the freed slave. But that if a freed female slave, although leaving behind her four children, die without a testament, and without having suffered a capitis deminutio, the inheritance still belongs to the patron according to the law of the Twelve Tables. See sec. 51.

45. *Quæ autem diximus de patrono, eadem intellegemus et de filio patroni, item de nepote ex filio, et de pronepote ex nepote filio nato prognato.*

45. Now what we have said of a patron we understand applies equally to the son of a patron, also to the grandson by a son, and to the great grandson begotten by a grandson born to a son.

46. *Filia vero patroni, item neptis ex filio, et proneptis ex nepote filio nato prognata, quamvis idem jus habeant, quod lege XII tabularum patrono datum est, Prætor tamen vocat tantum masculini sexus patronorum liberos: sed filia, ut contra tabulas testamenti liberti vel ab intestato contra filium adoptivum vel uxorem nurumve dimidiæ partis bonorum possessionem petat, trium liberorum jure lege Papia consequitur: aliter hoc jus non habet. (n)*

46. But, although the daughter of a patron, also his granddaughter by a son, and his great granddaughter begotten by a grandson born to a son, have the same rights which by the law of the Twelve Tables are granted to the patron himself, yet the prætor calls only the male children of patrons to the succession. But if a daughter sues for the possession of the property in one-half share either *contra tabulas testamenti* of a freed-man, or in a case of intestacy in opposition to the adopted son, or the wife, or the daughter-in-law, she will obtain it by the lex Papia, in virtue of the birth of three children (*jus trium liberorum*); but without this plea she has no legal claim.

(a) The sons of the patron were regarded as the patron himself, and concurred with the children of the enfranchised. Also the grandson of the patron, by his son, and his great-grandson descending by a male, were treated in the same manner. The daughters of the patron or their descendants by males obtained nothing by the *lex Papia*, unless they had given birth to three children. Male descendants by women could not participate, as they had not the rights of the children of the patron. *Domenget in loco.*

47. *Sed ut ex bonis libertae (a) suæ quattuor liberos habentis viriles pars ei deberetur, liberorum quidem jure non est comprehensum, ut quidem putant. Sed tamen intestata liberta mortua, verba legis Papia faciunt, ut ei virilis pars debeat. Si vero testamento facto mortua sit liberta, tale jus ei datur, quale datum est patronæ tribus liberis honoratæ, ut proinde bonorum possessionem habeat, quam patronus liberique contra tabulas testamenti liberti habent: quamvis parum diligenter ea pars legis scripta sit.*

47. But some think, that this claim to the virile portion, on the ground of having three children, is not indeed to be sustained, when it would be due to her from the property of a freed-woman, who herself has four children. But yet if the freed-woman has died intestate, the express words of the *lex Papia* direct that the equal share shall be paid. If, however, the freed-woman die after having made a will, a similar right is given to a daughter of the patron, as is granted to a patrona benefited by the *jus trium liberorum*; so that she has the *bonorum possessio*, just as the patron and his male children have in opposition to the terms of the testament of the freed-man: although this portion of the law has been expressed with too little care.

(a) Huschke says that at the beginning of this section Gaius clearly asserts the necessary right of inheritance belonging to the daughter of the patron of a liberta with four children to a share of the property *in capite*. This, according to the opinion of some, was independent of her having children herself. Such a right of inheritance clearly appertained to her, according to the words of the Papian law, if the freed slave died without having made a will. He thinks that the words inserted by Lachmann in the first lacuna.

“non est comprehensum,” correspond with this idea just as little as Goeschen’s proposed, “non consequitur,” and that we may read just as easily, according to the written signs, “opus ei non est.” Instead of the “debeatur” of Goeschen, we have read with Lachmann “deberetur.” Huschke subsequently corrects his own earlier emendation (Stud. p. 42) as follows: “Tale jus ei datur quale datum est patronæ tribus liberis honoratæ, ut proinde partis dimidiæ bonorum habeat possessionem quam patronus liberique contra tabulas testamenti liberti habent.” Upon this he has observed that Lachmann’s very prominent division of the words in the MS. is not so certain and important as according to Lachmann might appear. Kritik, pp. 57, 58.

48. Ex his apparet extraneos heredes patronorum longe remotum ab omni eo jure iri, quod vel in intestatorum bonis vel contra tabulas testamenti patrono competit. (p)

48. From these things it appears that the *heredes extranei* of a patron will be completely excluded from every right which accrues to a patron, either as to the property of intestates or that granted in contravention of the testamentary tablets.

(p) In this passage Gaius in speaking of the “bona Latini liberti,” wishes to say that the “heredes extranei,” as contradistinguished from the children of the patron, had no intestate right, nor were they entitled to the *legitima portio* of the property of the manumissus. “Remotum esse ab aliqua re,” for “alienum esse,” is good Latin, and is often employed by the jurists. ll. 7. s. 16; 27. s. 4. Dig. de. pact. (2. 14.). Cic. agrar. 2. 12. fin. Huschke remarks that we cannot say “remotum iri” of an exclusion that does not happen at some time or other, and the emendation in this passage made by Lachmann must be corrected; he would read “longe remotos esse ab omni eo hereditario quod, etc.,” and has followed this emendation in his own edition of Gaius. See Kritik, p. 58.

49. Patronæ olim ante legem Papiam hoc solum jus habebant in

49. Formerly before the passing of the lex Papia, female patrons had

bonis libertorum, quod etiam patronis ex lege XII tabularum datum est. Nec enim ut contra tabulas testamenti, in quo *præteritæ* erant, vel ab intestato contra filium adoptivum vel uxorem nurumve bonorum possessionem partis dimidiæ peterent, Prætor similiter ut patrono liberisque ejus concessit.

50. Sed postea lex Papia duobus liberis honoratæ ingenuæ patronæ, libertinæ tribus, eadem fere jura dedit quæ ex edicto Prætoris patroni habent. (q) Trium vero liberorum jure honoratæ ingenuæ patronæ ea jura dedit quæ per eandem legem patrono data sunt: libertinæ autem patronæ non idem juris præstitit.

(q) The lex Papia afforded assistance to female patrons who had given birth to a certain number of children. Thus a *patrona ingenua* having had three children obtained the same rights as the patronus himself. Those having had two children obtained almost the same privileges.

51. Quod autem ad libertinaram bona pertinet, si quidem intestatæ decesserint, nihil novi patronæ liberis honoratæ lex Papia præstat. Itaque si neque ipsa patrona, neque liberta capite diminuta sit, ex lege XII tabularum ad eam hereditas pertinet, et excluduntur libertæ liberi; quod juris est etiam si liberis honorata non sit patrona: numquam enim, sicut supra diximus, feminæ suum heredem habere possunt. Si vero vel hujus vel illius capitis diminutio interve-

only that claim upon the goods of the freedmen which is granted to patrons by the law of the Twelve Tables. For they could claim possession of the half share of the property neither *contra tabulas* when they were passed over in a will, nor in the case of intestacy, against the adopted son, the wife, or the daughter-in-law. The Prætor makes the grant as in the case of a patron and his children.

50. But afterwards the lex Papia granted to free-born patrons who had two children, and to freed-women who had three children, almost the same privileges as patrons obtain by the Prætorian edict. But free-born patronæ having privileges by the "jus trium liberorum," acquired those rights which were granted by the same law to a patron; however, to freedwomen who had become patronæ, the same legal right was not extended.

51. Now so far as relates to the property of freedwomen, if they have died intestate, the lex Papia makes no new provision for the benefit of a patrona honoured by having children. Therefore if neither the patrona, herself, nor the freedwoman has suffered a *capitis diminutio*, the inheritance belongs to her by the law of the Twelve Tables—and the children of the freedwoman are excluded. The rule of law is the same even if the patrona has not gained privileges

niat, rursus liberi libertæ excludunt patronam. Quia legitimo jure *capitis deminutione* perempto evenit, ut liberi libertæ cognationis jure potiores habeantur.

by having had children. For as we have said above, women can never have a *suus heres*; but if either the one or the other has suffered a *capitis deminutio*, the children of the freed-woman exclude the patrona. Since, the legal right having been destroyed by the *capitis deminutio*, it comes to pass that the children of the freed-woman have the stronger claim by the right of relationship.

52. Cum autem testamento facto moritur liberta, ea quidem patrona quæ liberis honorata non est nihil juris habet contra libertæ testamentum: ei vero quæ liberis honorata sit, hoc jus tribuitur per legem Papiam quod habet ex edicto patronus contra tabulas liberti.

52. But when a freed-woman dies after having made a testament, that patrona indeed who has not obtained privileges by reason of the number of her children has no right as against the testament of the freed-woman; but to her who has the requisite number of children, the same right is secured by the *lex Papia* which the patron has by the *Prætorian edict* in opposition to the tablets of the will of his freed-man.

53. Eadem lex patronæ filiæ liberis honoratæ—patroni jura dedit; sed in hujus persona etiam unius filii filiæve jus sufficit.

53. The same law granted the rights of a patron to the daughter of a patrona, if she herself has the privilege by the birth of children; but with regard to the patrona, the law is satisfied if she have one son or daughter.

54. Hactenus omnia ea jura (r) quasi per indicem tetigisse satis est: alioquin diligentior interpretatio propriis commentariis exposita est.

54. It is sufficient thus far to have touched upon all these rights, merely pointing them out: their interpretation is more clearly set forth in special commentaries.

(r) According to Huschke, Gaius could not have written "omnia jure," and he has given the reading "omnia illa jura." He thinks that *illa* was omitted in error from the MS. through the similarity of *illa* to *ima*. Kritik p. 58.

55. Sequitur ut de bonis Latinorum libertinorum dispiciamus.

56. Quæ pars juris ut manifestior fiat, admonendi sumus, de quo alio loco diximus, eos qui nunc Latini Juniani dicuntur olim ex jure Quiritium servos fuisse, sed auxilio Prætoris, in libertatis forma servari solitos; unde etiam res eorum peculii jure ad patronos pertinere solita est; postea vero per legem Juniam eos omnes quos Prætor in libertatem tuebatur liberos esse coepisse et appellatos esse Latinos Junianos: Latinos ideo, quia lex eos liberos perinde esse voluit, atque si essent cives Romani ingenui qui ex urbe Roma in Latinas colonias deducti Latini coloniarii esse coeperunt: Junianos ideo, quia per legem Juniam liberi facti sunt, etiamsi non cives Romani. Quare legis Juniæ lator, cum intellegeret futurum, ut ea fictione res Latinorum defunctorum ad patronos pertinere desinerent, ob id quod neque ut servi decederent, ut possent jure peculii res eorum ad patronos pertinere, neque liberti Latini hominis bona possent manumissionis jure ad patronos pertinere, necessarium existimavit, ne beneficium istis datum in injuriam patronorum converteretur, cavere, ut bona horum libertorum proinde ad manumissores pertinerent, ac si lex lata non esset. Itaque jure quodammodo peculii bona Latinorum ad manumissores eorum pertinent. (s)

55. It now remains for us to treat of the rights to the property of Latin freed-men.

56. That this part of the law may be more plainly set forth, we must call to mind what we have said in another place, that those who are now called Latini Juniani were formerly slaves *ex jure Quiritium*; but by the help of the Prætor, they were secured in a species of freedom; on which account their property used to belong to their patrons by the *jus peculium*. But afterwards, by the lex Junia, all those whom the Prætor protected in the exercise of their freedom began to be really free men, and they were called Latini Juniani. *Latini*, because the law decreed that they should be free, just as if they had been free-born Roman citizens who, having withdrawn from the city of Rome into Latin settlements were therefore accounted Latin colonists. *Juniani*, because they were made free by the lex Junia, just as if they had not been Roman citizens. Wherefore, when the proposer of the lex Junia understood that as the consequence of this legal fiction the property of deceased Latini would no longer accrue to their patrons—for as they did not die slaves, in which case their property would have belonged to their patrons by the *jus peculii*, but being freed Latini, the property could not belong to their patrons by right of manumission—he judged it expedient to secure that the benefit granted to these men should not be turned into an injustice towards the patrons. It was therefore provided that the property of these freed-men should belong to their manumitters, just as if

the lex had not been passed. Thus the property of these Latini belongs to their manumissors as it were by the *jus peculii*.

(s) The MS. has the word "Junia" twice, and no doubt correctly. This passage rather serves to confirm the established opinion, that this lex was originated by the consuls M. Junius Silanus and L. Junius Norbanus Balbus, A. U. C. 772. On account of the similarity of the two names the lex was usually called Junia. This nomenclature corresponds with that employed in the case of the lex Papia Poppæa, which was customarily cited as the lex Papia. Jurists wishing to indicate the part which both consuls took in the passing of this law, deviated from the ordinary rule by employing the name of one of the consuls and the cognomen of the other; hence the law was called the lex Junia Norbana. s. 3. Instit. de libert. (1. 5.) Theoph. *ibid*. This peculiar designation may be further justified from the fact that the Norbani belonged to the gens Junia, just as the Marcelli belonged to the Claudian gens. Cic. de orat. 1. 39. Gruter 1041. 14. Petron. 38.

The word *legislator* instead of *legislatores*, which might have been expected, is neither erroneous nor inexact. For when an act proceeded from the college of Magistrates one name only it seems was employed to designate the act. Such we know was the case with the Censors. Compare iii. 75. 76. Huschke's Kritik, p. 59.

Upon the Latini Juniani see the notes to section 22 of the first book. A Latinus Junianus possessed no capacity to make a will. When he died it was not his testament, but simply the law, that determined to whom his property should go. Nor is a "*successio ab intestato*" to be spoken of, for a Latinus had no agnates. The patron could not succeed "*ab intestato*," as the right of inheritance which accrued to the patron was founded upon the fiction of agnation between the client and the patron. Such a fiction

it is obvious was not admissible in the case of the Latini Juniani, since the fitness to stand within the agnatic circle was denied to this people. Thus, neither the patron nor any one else would have had a claim to the property of a deceased Latinus, if the *lex Junia* had not, in view of the difficulty, come to their aid with its enactments. The text explains the device employed to aid this people under their civil disabilities. Previous to the passing of the *lex Junia*, as we have already seen, book i. s. 22, the manumissi who became Latini Juniani were removed in their status only one degree from the most abject slavery. Their disabilities were especially felt in relation to their property. All that the Latinus acquired belonged to his manumissor, just as the acquisitions of a slave belonged to his owner. Dositheus in his *Fragmenta*, s. 7, says, "*Omnia autem, tanquam servus, acquirebat manumissori, vel si quid stipulabatur, vel per scripturam accipiebat, vel ex quacunque alia causa acquisierat, domino hoc faciebat; hoc est manumissus omnia bona patrono acquirebat;*" to which Gaius in the text adds, "*Unde etiam res eorum peculii jure ad patronos pertinere solita est.*" When the Latinus died, his property belonged to his manumissor as a kind of peculium. Hence, if no emancipation intervened, the Latinus was only permitted to live as a free man, whilst when he died he was bereft of all as a slave. Justinian says, "*Qui licet ut liberi vitam suam peragebant, attamen in ipso ultimo spiritu simul animam atque libertatem amittebant.*" s. ult. *Instit. de succes. libert.* (3. 7.) It is thus clear that the property of a manumissus at his death became a constituent part of the property of his patron. There would be in the nature of things a great difference between such an acquisition and that made by the patron when the manumissus became a Roman. In the latter case it should be carefully noted that the patron only succeeded when the manumissus died intestate, and left no sui heredes. Then, again, it was the patron and his agnate children—including, moreover, the daughter of the patron who succeeded, but not as heir of her father—that

were called to the inheritance. When several persons were called, the one entitled to the property was determined by nearness of degree to the patron. Those who were in the same degree divided the inheritance *in capite*. In all these points there was a marked divergence when the manumissor took the property of the Latini Juniani—variations originating and to be explained by reference to the foregoing principles.

1. The patron and his successors were the only persons entitled ; not the testamentary heirs, nor the relatives of the deceased, nor the descendants of the same.

2. The property of a Latinus fell immediately to the manumissor himself, and, if he were already dead, to his heirs, whether they were his children or not, and also whether they were called to the inheritance by testament or by law.

3. As to the division of the property, it was not made *per capite*, but was regulated by the portion of the inheritance allotted to the heirs by the patron through whom they became entitled.

4. If there were several manumissores they each took according to the proportion of their former ownership in the Latinus, and the heirs of each of these took the part which the testator, or person through whom they claimed, would have taken.

5. If one of several manumissores disclaimed his portion, there was no *jus accrescendi*, for this arose, as we have seen, from the supposition that each of the heirs succeeded to the entire property. The portion disclaimed became *caduca* and fell to the *fiscus*.

Lastly. The manumissor had as good a claim to the property of the Latinus as to any part of his own estate, a claim however which only matured on the death of the Latinus. Ulp. xxix. 5. sec. ult. Instit. de success. libertor. (3. 7.) ll. 8. 10. Cod. de Lat. lib. tol. (7. 6.) Huschke's Studien, secs. 33, 34 et seq., and especially Von Vangerow's "Latini Juniani," s. 25. pp. 129—135, where this subject is most ably discussed.

57. *Unde evenit, ut multum differant ea jura quæ in bonis Latino- rum ex lege Junia constituta sunt, ab his quæ in hereditate civium Romanorum libertorum observantur.*

57. Whence it comes to pass, that those rights which by the *lex Junia* are attached to the property of Latini greatly differ from those which are established with respect to the inheritance of freed Roman citizens.

58. *Nam civis Romani liberti hereditas ad extraneos heredes patroni nullo modo pertinet: ad filium autem patroni nepotesque ex filio et pronepotes ex nepote filio nato prognatos omnimodo pertinet, etiamsi a parente fuerint exheredati: Latinorem autem bona tanquam peculia servorum etiam ad extraneos heredes pertinent, et ad liberos manumissoris exheredatos non pertinent.*

58. For the legal succession to a freed Roman citizen belongs under no circumstances to the *heredes extranei* of the patron, but they appertain entirely to the son of a patron, to his grandsons born to a son, and to the great grandsons begotten by a grandson born to a son, even if these persons have been disinherited by their agnate ascendant. The goods of Latini, however, belong to *heredes extranei* in the same manner as the separate goods (*peculia*) of slaves and do not belong to the disinherited children of the manumittor.

59. *Item civis Romani liberti hereditas ad duos pluresve patronos æqualiter pertinet, licet dispar in eo servo dominium habuerint: bona vero Latinorum pro ea parte pertinent pro qua parte quisque eorum dominus fuerit. (t)*

59. Also the right of inheritance to a freed Roman citizen belongs equally to two or more patrons, although they might have had an unequal right of property in that slave; on the other hand the goods of Latini are assigned in proportion to the share which each master had in the Latinus.

(t) The property of a Latinus was divided between the different masters who had owned him at the moment of his enfranchisement, not equally, but according to their respective interests in him. This succession came to them as a kind of *peculium*, whilst the inheritance of an enfranchised Roman citizen was acquired by each of the patrons in equal shares. It would of course have been otherwise if the slave, at first enfranchised, had subsequently fallen under the potestas of another owner, who had also in his turn after-

wards manumitted the slave. Thus, Marcellus says, "Si libertus meus in servitutem redactus, postea ab alio liberatus est, et ejus coeperit esse libertus, præfertur mihi in contra tabulas bonorum possessione, qui eum manumisit." 1. 32. de bon. libert. (38. 2). Domenget in loco.

60. Item in hereditate civis Romani liberti patronus alterius patroni filium excludit, et filius patroni alterius patroni nepotem repellit: bona autem Latinorum et ad ipsum patronum et ad alterius patroni heredem simul pertinent pro qua parte ad ipsum manumissorem pertinerent.

61. Item si unius patroni tres forte liberi sunt, et alterius unus, hereditas civis Romani liberti in capita dividitur, id est tres fratres tres portiones ferunt et unus quartam: bona vero Latinorum pro ea parte ad successores pertinent pro qua parte ad ipsum manumissorem pertinent.

62. Item si alter ex iis patronis suam partem in hereditatem civis Romani liberti spernat, vel ante moriatur quam cernat, tota hereditas ad alterum pertinet: bona autem Latini pro parte decedentis patroni caduca fiunt et ad populum pertinent. (")

60. Also with respect to the inheritance of a freed Roman citizen, one patron excludes the son of another patron, and the son of one patron excludes the grandson of another; but the property of Latini belongs equally to the one patron, and to the heir of the other patron, in the same proportion as it would belong to the manumitter himself.

61. Again, if for example there are three sons of one patron, and one son of another, the inheritance of a freed Roman citizen is divided *per capita*, i.e. the three brothers take three portions and the one a fourth portion; but the goods of Latini belong to the successors of a patron in the same proportion as they belong to the manumitter himself.

62. Again, if one of these patrons repudiates his share in the inheritance of a freed Roman citizen, or dies before he has taken possession by *cretio*, the whole inheritance passes to the other; but the goods of a Latinus, so far as regards the share of the patron not accepting, become *caduca*, and belong to the state.

(") Gaius speaks here only of the case when one of the several manumissores disclaimed his portion of the inheritance, which consequently forces upon us another question, namely, whether the same doctrine held good if one of several heirs of a manumissor disclaimed his right to the pro-

perty of a deceased Latinus, as in the case of the manumissor himself, or if in such a case a *jus accrescendi* did not take place. Von Vangerow is of opinion that since the estate of a Latinus must be viewed as a part of the property of the manumissor, there could be no actual disclaimer of the estate by the heir, for it is a well-known principle of Roman law that an inheritance cannot be partly accepted and partly rejected. As soon therefore as any one of the heirs entered upon the inheritance of a Latinus, the portion passed to the rest of the co-heirs by operation of law; but in such a way that it could not be injurious to any one of them, since the property of the Latinus accrued to the manumissores or their heirs as a *peculium*. This being the case, it admits of no doubt that the general principles applicable to the case of a person to whom a *peculium* reverted came also into operation here, namely, that the heir was not held unconditionally liable for the passive obligations of the deceased Latinus; but that his liability extended only to the amount of that portion of the estate which, in this way accrued to him as a kind of *peculium*. Hence, we perceive, that there was an essential difference between this succession and that of the patron to the property of a manumitted Roman citizen. ll. 1. 2. 10. 35. 36. 80. s. 1. de *adquir. vel omitt. hered.* (29. 2.) Von Vangerow *Latini Juniani*, pp. 134, 135.

63. *Postea Lupo et Largo Consulibus senatus censuit, ut bona (v) Latinorum primum ad eum pertinerent qui eos liberasset; deinde ad liberos eorum non nominatim exheredatos, uti quisque proximus esset; tunc antiquo jure ad heredes eorum qui liberassent pertinerent.*

63. Afterwards, in the consulship of Lupus and Largus, the senate decreed that the goods of Latins should belong in the first instance to him who had secured for them freedom (their patron); then to such children of those persons as stood nearest in succession, provided they had not been disinherited by name; finally, by the old law they would pass to the heirs of those persons who had secured for them freedom.

(r) The *senatus-consultum Largianum* was enacted in the first year of the reign of the Emperor Claudius, and established a kind of hereditary right to the property of a *Latinus Junianus* in favour of the children of a manumissor, not disinherited by name, and in preference to any strangers (*extranei*) who were legally instituted heirs. As we learn from Gaius, this *senatus-consultum* was passed under the consulship of Lupus and Largus, and its effect was that it gave to children who were not expressly disinherited the preference over *extranei heredes*. Thus, the emancipated son of the patron who had been passed over in his adopted father's will, and who had no claim to the *bonorum possessio* of his father's property *contra tabulas testamenti*, had still a claim to the property of a *Latinus* even prior to the *extranei heredes*. Instit. s. 4. de success. lib. (3. 7.) Cod. de Lat. lib. toll. etc. (6. 7.) and the article "Patronus," Diet. of Gr. and Rom. Ant. p. 731.

64. Quo *senatusconsulto* quidam *id actum esse* putant, ut in bonis *Latinorum* eodem jure utamur, quo utimur in hereditate civium *Romanorum libertinorum*; idemque maxime *Pegaso* placuit. Quæ sententia aperte falsa est. Nam civis *Romani liberti* hereditas numquam ad *extraneos patroni heredes* *pertinet*: bona autem *Latinorum* etiam ex hoc ipso *senatusconsulto* non obstantibus liberis manumissoris etiam ad *extraneos heredes* pertinent. Item in hereditate *civis Romani liberti liberis* manumissoris nulla exhereditatio nocet: in bonis *Latinorum* autem nocere nominatim factam exheredationem ipso *senatusconsulto* significatur. Verius est ergo hoc solum eo *senatusconsulto* actum esse, ut manumissoris liberi qui nominatim exhereditati non sint præferantur *extraneis heredibus*.

64. Some indeed think that as the result of this *senatus-consultum*, we apply the same rule to the property of *Latini* as to the inheritance of freed-men who are *Roman* citizens; and such was certainly the conclusion of *Pegasus*. This opinion is clearly erroneous. For the inheritance of a freed *Roman* citizen never belongs to the *extranei* who are heirs of the patron: but even by this very *senatus-consultum* the property of *Latini* may pass to the *extranei*, if the children of the manumittor do not oppose. Further, so far as the inheritance of a freed *Roman* citizen is concerned, disinherison does not deprive the children of the manumittor of their right; but with respect to the property of *Latini*, the *senatus-consultum* itself declares that a disinherison made by name destroys

the right. It is therefore more correctly said that this *senatus-consultum* simply provides that the children of the manumitter who are not disinherited by name, shall be preferred to the *extranei heredes*.

65. *Itaque et emancipatus filius patroni præteritus, quamvis contra tabulas testamenti parentis sui bonorum possessionem non petierit, tamen extraneis heredibus in bonis Latinorum potior habetur.*

65. Thus also the emancipated son of a patron who is passed over in his will, although he has not sued for the possession of the property of his father *contra tabulas*, has nevertheless a stronger claim to the goods of Latini than the *extranei heredes*.

66. *Item filia ceterique quos exheredes licet jure civili facere inter ceteros, quamvis id sufficiat, ut ab omni hereditate patris sui summoveantur, tamen in bonis Latinorum, nisi nominatim a parente fuerint exheredati, potiores erunt extraneis heredibus.*

66. The same is true of a daughter and other persons whom it is permitted to disinherit by a general clause (*inter ceteros*). For although that disinherison may be effective in depriving them of all legal succession to their father, yet with respect to the property of Latini, their claims will prevail over that of the *extranei heredes*, unless the father has disinherited them by name.

67. *Item ad liberos qui ab hereditate parentis se abstinuerunt, bona Latinorum pertinent, quamvis alieni habeantur a paterna hereditate, quia ab hereditate exheredati nullo modo dici possunt, non magis quam qui testamento silentio præteriti sunt. (w)*

67. Again, the property of Latini belongs to children who have disclaimed the inheritance of their father, although they are accounted aliens as to the paternal inheritance; because they can in no way be said to have lost their legal succession by disinherison, any more than those who have been silently passed over in the testament.

(w) In this section Gneist has adopted the latest emendation of Huschke, who says that the present reading corresponds better than his earlier attempt with the meaning of Gaius, and with the signs in the MS. Kritik, p. 59.

68. *Ex his omnibus satis illud apparet, si is qui Latinum fecerit, . . .*

[Lacuna of 25 lines.]

69. *putant ad eos pertinere, quia nullo interveniente extraneo herede senatusconsulto locus non est.*

70. *Sed si cum liberis suis etiam extraneum heredem patronus reliquerit, Caelius Sabinus ait tota bona pro virilibus partibus ad liberos defuncti pertinere, quia cum extraneus heres intervenit, non habet lex Junia locum, sed senatusconsultum. Javolenus autem ait tantum eam partem ex senatusconsulto liberos patroni pro virilibus partibus habituros esse, quam extranei heredes ante senatusconsultum lege Junia habituri essent, reliquas vero partes pro hereditariis partibus ad eos pertinere.*

71. *Item quæritur, an hoc senatusconsultum ad eos patroni liberos pertineat qui ex filia neptevæ procreantur, id est ut nepos meus ex filia potior sit in bonis Latini mei quam extraneus heres. Item an ad maternos Latinos hoc senatusconsultum pertineat, quæritur, id est ut in bonis Latini materni potior sit patronæ filius quam heres extraneus matris. Cassio placuit utroque casu locum esse senatusconsulto. Sed hujus sententiam plerique improbant, quia senatus de his liberis patronarum nihil sentiat, qui aliam familiam sequerentur. Idque ex eo adparet,*

68. *From all these things it sufficiently appears that if he who has made a Latinus free*

69. *some think that the property belongs to them, because as no extraneus heres intervenes, the senatus-consultum does not take effect.*

70. *But if a patron has left an extraneus as heir with his own children, Caelius Sabinus says that all the property passes in equal shares to the children of the deceased, because when an extraneus heir intervenes, the lex Junia is not applicable, but the senatus-consultum is. Javolenus, on the other hand, says that by the senatus-consultum the children of the patron will have for division equally amongst them only that share which the extranei heredes would have acquired by the lex Junia, while the remaining shares accrue to them according to the divisions of the inheritance.*

71. *Again, it is enquired whether this senatus-consultum extends to those children of a patron who are born to a daughter or granddaughter, that is, whether my grandson by a daughter has a stronger claim to the property of my Latinus than an heres extraneus. A further question arises whether this senatus-consultum extends to Latini appertaining to the mother (Latini materni), that is, whether the son of a patrona has a stronger claim to the property of a Latinus maternus than the heres extraneus of the mother. Cassius was of opinion that the senatus-consultum*

quod nominatim exheredatos sum-
ovet: nam videtur de his sentire
qui exheredari a parente solent, si
heredes non instituantur; neque
autem matri filium filiamve, neque
avo materno nepotem neptemve, si
eum eamve heredem non instituat,
exheredare necesse est, sive de jure
civili quæramus, sive de edicto Præ-
toris quo præteritis liberis contra
tabulas testamenti bonorum pos-
sessio promittitur. (x)

was applicable to both cases; but
very many disapprove of his opinion,
since the senate determined nothing
concerning those children of a patrona
who are admitted into another family.
From this it also appears that
the senatus-consultum removes those
disinherited by name; for it seems to
have in view those usually dis-
inherited by their agnate ascendant,
when they are not instituted heirs.
It is not necessary for the mother to
disinherit the son or daughter, nor
for the maternal grandfather to dis-
inherit the grandson or granddaugh-
ter, if neither is instituted heir.
This question is so determined both in
accordance with the *jus civile* and the
Prætorian edict by which the posses-
sion of the property *contra tabulas tes-*
amenti is promised to the children
who are passed over.

(x) It was a question whether the senatus-consultum Largianum was only advantageous to the sons of the patron, to his descendants by males, and to the daughter in the first degree; or whether its benefits were extended to the descendants of the patron by his daughters, as well as to the sons of the patrona, and this also in such a way that they might be able to exclude the *heredes extranei* of the patronus. Cassius regarded the senatus-consultum as applicable to both cases; but his opinion was not followed as far as regarded the property of the manumissus of the patrona. The paragraph has been understood by Demengeat to imply that in practice the opinion of Cassius was rejected in both cases. Demengeat ii. 70.

72. Aliquando tamen civis Ro-
manus libertus tamquam Latinus
moritur, veluti si Latinus salvo jure
patroni ab Imperatore jus Quiritium

72. Yet sometimes a freed Roman
citizen is at his death regarded as a
Latinus, for example, if a Latinus
has obtained from the Emperor the

consecutus fuerit: nam *ita* divus Trajanus constituit, si Latinus invito vel ignorante patrono jus Quiritium ab Imperatore consecutus sit. Quibus casibus dum vivit iste libertus, ceteris civibus Romanis libertis similis est et justos liberos procreat, moritur autem Latini jure, nec ei liberi ejus heredes esse possunt; et in hoc tantum habet testamenti factionem, uti patronum heredem instituat eique, si heres esse noluerit, alium substituere possit. (y)

benefits of Quiritarian law with a reservation of the rights of his patron. For the Emperor Trajan decreed this should be, where a Latinus has gained from the Emperor the jus Quiritium, without the consent or knowledge of his patron. In which cases, whilst he lives he is a freed-man, like all other freed Roman citizens, and children born to him are legitimate; but at his death his rights are those of a Latinus, nor can his children be his heirs; and he has the power of making a testament only to this extent, that he may institute his patron as his heir and may further substitute some one else if the patron is unwilling to be heir.

(y) It was a very great hardship for the libertus, that, although he lived as a Roman, he always died as a slave. It was therefore determined by a senatus-consultum passed in the reign of Hadrian that Latini to whom the emperor had granted the jus Quiritium should attain, by means of the *anniculi* or the *erroris probatio*, the same condition legally that they would have enjoyed if they had remained Latini. Hence, they died as manumitted Romans. Von Vangerow's Latini Juniani, p. 201.

73. Et quia hac consuetudine videbatur effectum, ut numquam isti homines tamquam cives Romani morentur, quamvis eo jure postea usi essent, quo vel ex lege *Ælia Sentia* vel ex senatusconsulto cives Romani essent: divus Hadrianus iniquitate rei motus auctor fuit senatusconsulti faciendi, ut qui ignorante vel recusante patrono ab Imperatore jus Quiritium consecuti essent, si eo jure postea usi essent, quo ex lege *Ælia Sentia* vel ex senatusconsulto, si Latini mansissent, civitatem Romanam conse-

73. It seemed to result from this constitution, that such men could never at death have the rights of Roman citizens, although after enfranchisement they had availed themselves of the law by which, in virtue of the lex *Ælia Sentia* or the senatus-consultum, they might become Roman citizens. The Emperor Hadrian influenced by the injustice of this, secured the passing of a senatus-consultum, which provided that those who had attained the jus Quiritium without the knowledge or

querentur, proinde ipsi haberentur, ac si lege Ælia Sentia vel senatus-consulto ad civitatem Romanam pervenissent. (z)

consent of a patron—if they had afterwards availed themselves of that right by which in virtue of the *lex Ælia Sentia* or of the *senatus-consultum* they might have attained the *civitas* if they had remained *Latini*—should themselves be considered in the same position, as if they had attained the Roman citizenship by virtue of the *lex Ælia Sentia* or the *senatus-consultum*.

(z) Comparing what Gaius says in this section with the statement made by him in section 5 of this book, we learn that there were two modes by which the *Latini* might attain the Roman *civitas*: namely, *ex lege* or *ex senatus consulto*. One indeed only of these two modes, namely, the “*causæ probatio ex lege Ælia*, or the “*anniculi probatio*,” was introduced with the distinct object of preparing the way for *manumissi* to attain the Roman citizenship: but the other, namely the “*causæ probatio ex senatus-consulto*,” or the “*erroris probatio*,” proceeded from a much more comprehensive principle, and hence the *Latini* only obtained the citizenship “*ex senatus-consulto*” as a consequence. It is quite plain that the Romans when they speak of the modes by which a *Latinus* might obtain the *civitas* only mention the first-named source, and refer afterwards to the *senatus-consultum* as an enactment possessing a much more extended scope. Thus, Ulpianus says “*Nam lege Junia cautum, etc.*” and then adds, “*partus quoque civis Romanus, est ex senatusconsulto, quod auctore divo Hadriano factum, est.*” Tit. 3. sec 3. tit. 7. sec. 4. Gai. 1. sec. 29 et seq. sec. 67 et seq.; Von Vangerow’s *Lat. Jun.* p. 163.

74. Eorum autem quos *lex Ælia Sentia* dediticiorum numero facit, bona modo quasi *civium Romanorum* libertorum, modo quasi *Latinorum* ad patronos pertinent.

74. Now the property of those persons whom the *lex Ælia Sentia* puts in the number of the “*Dediticii*,” belonged to the patrons; at one time as if it were that of freed Roman citizens, at another time as if it were that of *Latini*.

75. Nam eorum bona qui, si in aliquo vitio non essent, manumissi cives Romani futuri essent, quasi civium Romanorum patronis eadem lege tribuuntur. Non tamen hi habent etiam testamenti factionem; nam id plerisque placuit, nec immerito: nam incredibile videbatur pessimæ conditionis hominibus voluisse legis latorem testamenti faciundi jus concedere.

76. Eorum vero bona qui, si non in aliquo vitio essent, manumissi futuri Latini essent, proinde tribuuntur patronis, ac si Latini decessissent. Nec me præterit non satis in ea re legis latorem voluntatem suam verbis expressisse.

77. Videamus autem et de ea successione quæ nobis ex emptione bonorum competit. (a)

75. By the same law the property of those who would have become Roman citizens, if they had not been subject to some legal defect, is assigned to their patrons, as if they had actually attained the *civitas*. Yet these persons have not the power of making a testament; such at least was the general opinion, and it is certainly sound. For it seemed incredible that the proposer of this *lex* should have wished to concede to men of the lowest status the power of making a will (*testamenti factio*).

76. Moreover, the property of those who, if they had not been subject to some legal defect, would have become Latini by manumission is assigned to their patrons, just as if such persons had died Latini. But it does not escape my notice that on this point the proposer of the law has not expressed his intention in words sufficiently clear.

77. Now let us turn our attention to that branch of succession which arises from the purchase of property (*emptio bonorum*).

(a) Gaius recognises, in addition to the *hereditas*, three other modes of succession *per universitatem*: namely, the *bonorum emptio*, *arrogatio* or *in manum conventio*, and the transfer of the inheritance by *in jure cessio*. The testimony of Gaius on this point is important, as it adds weight to the statement of Theophilus upon the same subject, the accuracy of which had been doubted. We have already seen that by the law of the Twelve Tables a debtor was allowed but thirty days to make arrangements for the payment of his debt. If this were not accomplished, he was after sixty days adjudged to his creditors, and then fettered

with at least twenty-five pounds weight of chains. On three nundinæ he was brought before the consul to ascertain whether he were able to free himself, or whether any one would pay his debt. If it was not paid, the creditors might kill him, or sell him into slavery beyond the Tiber. If there were several creditors, the law permitted them to hew the unhappy debtor to pieces, dividing his body in the ratio of their claims. Gel. Noctes Atticæ, lib. xx. c. 1. Gellius, however, informs us that this severe law was never actually carried into effect. We learn from several passages in Cicero that the creditors obtained, by virtue of the edict of the prætor, a claim to the property of the debtor and also the *bonorum venditio*. Pro Quinto c. 8. c. 19. This did not however destroy their hold upon the person of the debtor, for he remained *addictus*, technically speaking. The lex Julia released the person of the debtor from the terrible penalty of the ancient law. l. 4. cod. qui bonis. (7. 41). Gaius informs us that the *emptio bonorum* was applicable as well to the property of the living as the dead. See note ii. 97. According to both Gaius and Theophilus, the *bonorum emptio*, like the *bonorum possessio*, gave only a bonitarian ownership in the property of the debtor, and since the *bonorum emptio* was a Prætorian institution, such undoubtedly might have been expected. But this appears to be at variance with a statement of Varro, who says that the *bonorum emptio* was regarded as a mode of acquiring a Quiritarian ownership. De re rustica, lib. ii. c. 10. There are, moreover, passages in Gaius which seem to imply that in certain cases the *bonorum emptio* gave a quiritarian ownership. For Gaius says in the defective passage, sec. 80 of this book, that a *bonorum emptio* gave merely an estate *in bonis*; but adds “interdum quidem bonorum emptoribus, etc.,” so that the certain cases here referred to may have been those which Varro had in his mind. As confirmatory of this view, reference may be made to the passage in Gaius where he speaks of the action given to the “bonorum emptor,” as a fictitious action, “ficto herede

agit." We are indebted to Gaius for the information that the Prætor Rutilius introduced the *bonorum emptio*. Gaius states little new in regard to the succession of the *pater arrogans* or of the *coemptionator*. It seems probable that since Gaius mentions the universal succession before the *bonorum venditio*, he must have been ignorant of the "adictio bonorum libertatis causa," introduced by Marcus Aurelius. Gans thinks that this taken in connexion with many other things proves that Gaius composed his Institutes in the reign of Antoninus Pius, or at least in the early part of the reign of the Emperor Marcus. Gans Schol. zum Gai. pp. 378—385.

78. Bona autem veneunt aut vivorum aut mortuorum. Vivorum, velut eorum qui fraudationis causa latitant, nec absentes defenduntur; item eorum qui ex lege Julia bonis cedunt; item judicatorum post tempus, quod eis partim lege XII tabularum, partim edicto Prætoris ad expediendam pecuniam tribuitur. Mortuorum bona veneunt velut eorum, quibus certum est neque heredes neque bonorum possessores neque ullum alium justum successorem existere.

78. Now goods sold are either the property of the living or of the dead. Of the living, for example, of those who, on account of some fraudulent act, are in concealment and being absent are undefended: again, of those who by virtue of the lex Julia have made a surrender *in jure cessio*; further, of judgment debtors, on the expiration of the time granted them for raising the money, partly by the law of the Twelve Tables, partly by the edict of the Prætor. The goods of deceased persons are also sold, for example, of those with regard to whom it has been ascertained that no heir exists, nor any claimants to the *bonorum possessio*, nor any other legal successor.

79. Si quidem vivi bona veneant, jubet ea Prætor per dies continuos xxx possideri et proscribi; si vero mortui, post dies xv postea jubet convenire creditores, et ex eo numero magistrum creari, id est eum per quem bona veneant. Itaque si vivi bona veneant, in diebus pluribus

79. Whenever the goods of living persons are sold, the Prætor orders them to be held in possession for thirty successive days, and public announcement to be made. But if the property belonged to one deceased, after a possession of fifteen days he commands the creditors to be assembled, and

veniri jubet, si mortui, in diebus paucioribus; nam vivi bona xxx, mortui vero xx emptori addici jubet. Quare autem tardius viventium bonorum venditio compleri jubetur, illa ratio est, quia de vivis curandum erat, ne facile bonorum venditiones paterentur.

80. *Neque autem bonorum possessorum., neque bonorum emptorum res pleno jure fiunt, sed in bonis efficiuntur; ex jure Quiritium autem ita demum adquiruntur, si usuceperant. Interdum quidem bonorum emptorum idem plane jus quod est mancipum esse intellegitur, si per eos scilicet bonorum emptoribus addicitur qui publice sub hasta vendunt.*

81. *Item quæ debita sunt ei cujus fuerunt bona, aut ipse debuit, neque bonorum possessores neque bonorum emptores ipso jure debent aut ipsis debentur: sed de omnibus rebus utilibus actionibus et conveniuntur et experiuntur, quas inferius proponemus.*

an assignee (*magister*) to be appointed from amongst them i.e. one under whose directions the goods may be sold. Hence, if the property of a living man was to be sold, the Prætor gave longer time than if it belonged to one deceased: for he ordained that the property of a living man should be transferred after thirty days, of one deceased after twenty. The reason given, why the sale of the goods of any one living is ordered to be completed so slowly, is because we must take care that the living are not suffered easily to dispose of their property.

80. Now the property does not come with a complete legal title into the ownership of the bonorum possessors, nor into that of the bonorum emptors, but it is only held in their bonitarian ownership (*in bonis*); for it is first acquired by Quiritarian law (*ex jure Quiritium*) when their title is perfected by usucapion. Sometimes, indeed, the right of the *bonorum emptores* is understood to be manifestly the same as that of the *mancipes*, if indeed the property has been adjudged to the *bonorum emptores* by those who sell publicly by auction (*sub hasta*).

81. Again, if anything were due to the former owner of the property, or if he were himself indebted, neither those who acquired by *bonorum possessio* nor purchasers were legally liable for debts, or able to claim anything as due to themselves. But in all these cases actions are brought and defended under the procedure called the *actio utilis*, which we shall explain hereafter.

(b) Huschke has endeavoured to restore the text in sections 79 and 81. In his restitution of this passage contained in his work, "Das Recht des Nexum," p. 153, he has given the reading "bonorum emptorum idem plane jus, quod est mancipium esse intelligitur," to which the objection has been made that this conjectural reading cannot be accepted because Gaius has nowhere previously spoken of the *mancipes*. Huschke controverts this assertion by saying that it is very probable that the commentator had treated of *mancipes* in the missing page cxvi after ii. 26. For after having stated that the mancipation is the peculiar mode of transferring *res Mancipi*, for which purpose however, the *in jure cessio* possessed equal power, he observed for the first time, that if a *res Mancipi* is neither mancipated nor ceded in jure, the person who acquires it would in the case of eviction have no claim for the *duplum*, unless it were stipulated that on account of the peculiar mode of acquisition he should become entitled to the *jus nexi*, which authorized the party to set up a claim for the *duplum*. Again, a corporal *res nec Mancipi* could be alienated by means of the *in jure cessio*, but not by means of *mancipatio*. Still, the last admits of an exception, when a "res nec Mancipi" is alienated *fiduciæ causa*, where the title is an universal one, and thus the thing is alienated essentially as *familia*. In this way, Gaius naturally came to mention the *manceps*. Thus, if the state booty, or any other species of public property were alienated, the transfer itself was not called "mancipatio," but the person who bought it was called the *manceps*, because with raised hand he acknowledged himself to be the purchaser: and upon his being declared such, the complete dominium of both "res Mancipi" and "res nec Mancipi" was transferred to him. Hence, it followed that a corporal "res nec Mancipi," such as the *solum provinciale*, was not the object of the *mancipatio* technically speaking; but when sold *sub hasta* it passed to the purchaser, who at once gained a full and perfect ownership.

82. Sunt autem etiam alterius generis successiones, quæ neque lege XII. tabularum neque Prætoris edicto, sed eo jure quod consensu receptum est introductæ sunt.

82. There are successions of another kind, which have been introduced neither by the law of the Twelve Tables nor by the edict of the Prætor, but by that law which has been accepted by general consent.

JUST. iii. 10. pr.

83. *Ecce enim cum paterfamilias se in adoptionem dedit, mulierve in manum convenit, omnes ejus res incorporales et corporales quæque ei debitæ sunt, patri adoptivo coemptionatorive adquiruntur, exceptis iis quæ per capitis deminutionem pereunt, quales sunt ususfructus, operarum obligatio libertorum quæ per jusjurandum contracta est, et quæ continentur legitimo judicio.*

83. For when a paterfamilias has given himself in adoption, or a woman has made a *conventio in manum*, all possessions both corporal and incorporeal, as well as whatever else may be due to the estate are acquired by the adopting father, or by him who makes the coemptio, with the exception of those claims which are annulled by the *capitis deminutio*; such are usufructs, an obligation securing the services of freed-men when contracted under oath, and such things as are secured by a legal judgment.

JUST. iii. 10. 1.

84. *Sed ex diverso quod debet is qui se in adoptionem dedit, vel quæ in manum convenit, ad ipsum quidem coemptionatorem aut ad patrem adoptivum pertinet hereditarium æs alium, proque eo, quia suo nomine ipse pater adoptivus aut coemptionator heres fit, directo tenetur jure, non vero is qui se adoptandum dedit, quæve in manum convenit, quia desinit jure civili heres esse. De eo vero quod prius suo nomine eae personæ debuerint, licet neque pater adoptivus teneatur neque coemptionator, neque ipse quidem qui se in adoptionem dedit vel quæ in manum convenit, maneat obligatus obligatæ, quia scilicet per capitis diminutionem liberetur, tamen in eum eamve utilis actio datur rescissa capitis deminutione: et si adversus hanc actionem*

84. But on the other hand, whatever hereditary debt is owing by one who gives himself in adoption, or by the woman who makes a *conventio in manus*, attaches to the coemptionator or to the adopting father; and for this reason the adopting father or the coemptionator is liable in strict law, because he becomes nominally heir; but he who has given himself in adoption, and she who has come under the manus are not bound, because they have ceased to be heirs by the *jus civile*. But with regard to any debt which these persons incurred previously on their own account: although neither the adoptive father nor the coemptionator is liable, nor indeed is the man who has given himself in adoption, or the woman who has made the *conventio in manum*,

non defendantur, quæ bona eorum futura fuissent, si se alieno juri non subjecissent, universa vendere creditoribus Prætor permittit.

any longer bound, because they are undoubtedly freed from the obligation by the *capitis deminutio*, yet with respect to either the one or the other, a *utilis actio* is granted, and the *capitis deminutio* rescinded. If there is no defence to this action, the Prætor allows the creditors to sell all the property which would have passed to the adrogatus, and the woman in manus, if they had not brought themselves under legal subjection to another.

(b) In this acute restoration, for the most part made by Lachmann, a better arrangement of the words seems necessary. Taken in connection with *coemptionatorem*, “*ipsum*” has no meaning. Huschke says, “*Quod debet, etc.*,” is also in its present union with “*hereditarium æs alienum*” unintelligible; he proposes to read, “*vel quæ in manum convenit transit et ipsum ad coemptionem aut ad patrem adoptivum, si quidem est hereditarium æs alienum.*” “*Proque eo, etc.*,” on account of the “*suo nomine. . . heres fit,*” is a very doubtful reading, and the mere negative “*non vero is qui, etc.*” is certainly incorrect. It will be better to read, “*deque eo ipse coemptionator aut ipse pater adoptivus succedens, quia retro heres fit, directo tenetur jure, liberatur vero is, qui se adoptandum dedit, quæve in manum convenit, quia desinunt esse heredes.*” Huschke thinks we ought to read “*deque,*” instead of “*proque.*” “*Jure civile*” is also very improbable in this place. Kritik. p. 61.

85. *Item si is ad quem ab intestato legitimo jure pertinet hereditas eam hereditatem, antequam cernat aut pro herede gerat, alii in jure cedat, pleno jure heres fit is cui eam cesserit, perinde ac si ipse per legem ad hereditatem vocaretur. Quodsi posteaquam heres extiterit, cesserit, adhuc heres manet et ob id creditoribus ipse tenebitur: sed res corporales*

85. Again, if anyone to whom an inheritance legally descends by intestacy cedes it *in jure* to another before he takes it by *cretio* or acts as heir, the person to whom he has surrendered it becomes heir with full legal rights, just as if he himself had been called to the inheritance by law. But if the heir has made the surrender of the inheritance he still

transferet proinde ac si singulas in jure cessisset; debita vero pereunt eoque modo debitores hereditarii lucrum faciunt.

remains heir, and on that account will himself be held liable to the creditors. He will transfer the corporal property, just as if he ceded the thing *in jure*; but the debts are extinguished, and in that way those who inherit debts gain an advantage.

86. Idem juris est si, testamento scriptus heres, posteaquam heres extiterit, in jure cesserit hereditatem. Ante aditam vero hereditatem cedendo nihil agit.

86. The same rule of law applies if an heir appointed in a will, has ceded the inheritance *in jure*, after he has declared himself heir. But if he makes the cession before entrance upon the inheritance his act is entirely void (*nihil agit*).

87. Suus autem et necessarius heres an aliquid agant in jure cedendo, quæritur. Nostri præceptores nihil eos agere existimant: diversæ scholæ auctores idem eos agere putant, quod ceteri post aditam hereditatem; nihil enim interest, utrum aliquis cernendo aut pro herede gerendo heres fiat, an juris necessitate hereditati adstringatur.

87. Now it is a question whether a *heres suus* and a *heres necessarius* perform a valid act in making a surrender *in jure*. The teachers of our school are of opinion that they effect nothing by such an act. Writers of the opposite school think that their act has the same effect as that of other persons who surrender the inheritance after *adition*; for it makes no difference whether any one becomes heir by a *cretio*, or by acting *pro herede*, or whether he is constrained to take the inheritance by force of law.

(Linea vacua.)

88. Nunc transeamus ad obligationes. Quarum summa divisio in duas species deducitur: omnis enim obligatio vel ex contractu nascitur vel ex delicto. (c)

88. Now let us pass to obligations, of which the chief division is into two species; for every obligation arises either upon a contract (*ex contractu*) or a tort (*ex delicto*).

(c) The history of the Roman law of obligations is most important for the student of English law, and will be also found not without interest. Our space, however, will allow but little room for necessary historical explanations. The law

of obligations was gradually developed by means of the doctrines of the Roman jurists. There are no special enactments, and no legislative periods which serve as land-marks whereby to trace the great system of rules and the procedure of which Gaius is now about to explain the elements. No part of the Roman law shows more clearly the wisdom, the practical sagacity, and the profound sense of justice possessed by the great masters of the law than that which sets forth the principles and doctrines of obligations.

In the ancient Roman law, the notions of *obligatio* and *actio* were inseparable: for there was no obligation without its corresponding action. To imagine an obligation as existing without an action would have been a notion quite foreign and impossible to a Roman juridical mind. It was not indeed, till the later times of the law, when the great influence of the complex principles implied by the term "jus gentium" came into operation, that the idea of natural obligation arose in the mind of a Roman jurist. In the older law every obligation was viewed as a civil one, and where there was no such civil bond, the Romans could not conceive of the existence of an obligation. When we, however, speak of a natural obligation, the expression must not be confounded with what we, in modern phrase, denominate as a moral obligation. No doubt the Romans possessed high moral conceptions, for a sense of justice pervades their entire legal system. But the idea of natural obligation was with them something strictly jural, which lasted for ages, attracting to it its own legal consequences, until the times of Paulus and Ulpianus, when natural obligations came to a termination. The idea of natural obligation appears to have arisen about the close of the Republic, and was potent and active during the period of the classical jurists until the age already mentioned. In the ancient times of Rome, in order to give rise to an *obligatio*, there must be either a "nexum," a "stipulatio," or an "expensilatio." Beyond this narrow circle, during the early period of the State, any idea of a legal obligation certainly did not

extend. This limited notion of an obligation was subsequently marvellously developed, not, however “*ex lege*,” nor “*ex senatus-consulto*,” but by the doctrines of the jurists, and above all by the extension of that form of action known as the “*condictio*.” What is now referred to as the “*condictio causa data, causa non secuta*,” as will be hereafter more fully seen, enlarged the range of obligation to almost every possible transaction of life. Dig. de condict. etc. (12. 4.); Cod. de condict. ob caus. (4. 6.); l. 3. s. 2. Dig. tit. cit. (12. 2.) Again, the introduction of the “*actio in præscriptis verbis*,” the “*actio civilis in factum*,” the “*contracta innominata*,” and especially the influence of the Proculian school of jurists—with its philosophical spirit, its constant appeal to the principles, the appropriateness and the fitness of the law—added to the numerous “*utiles actiones*” given by the prætors, enlarged the range of legal obligations to such an extent that no transaction in human affairs was placed beyond the scope and range of obligatory operation. Thus, when we turn over the pages of the Digest, we see that they are crowded with prætorian actions *in factum* given as a protection against every possible invasion of right.

The simple notion of an obligation is the following :—It is that legal relation subsisting between two or more persons by virtue of which one is bound to the other in order to the performance of something. The Germans express this by saying that the debtor is bound to a “*leisten*,” that is, to give, to do, or to perform something. In the Institutes, Justinian defines an obligation as follows :—“*Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendæ rei secundum nostræ civitatis jura*.” Instit. pr. de oblig. (3. 13.) That is to say, an obligation is a bond of law which binds us to render something (*alicujus solvendæ rei*). The person who is thus bound to a *facere*, or, as it is expressed by Paulus in another passage, “*ad dandum aliquid vel faciendum, vel præstandum*,” is called the debtor. l. 2. pr. Dig. de oblig., etc. (47. 7.) The terms creditor and

debtor are applied to the persons who are united by the *vinculum juris*, and there must manifestly be at least two persons bound by every obligation; namely, the debtor, who is bound to a *solvere*, a *dare* or a *facere*, as the case may be; and the creditor, who possesses, as the Germans express it, a “Forderung,” or claim. What is of importance to observe is that an obligation differs from what is termed a *real right*; that is to say, a right in which the *thing itself* is the immediate object. In a “real right” the person entitled stands in direct legal relationship to the thing itself. It is however, quite different in an obligation. Here the relation is between two or more persons, and one of them is always bound to a *facere* or performance. There were some obligations in which there was apparently a nexus between a person and a thing: as for example, when a house or a farm was rented; or when there was a “*jus utendi fruendi*,” or a usufruct. To suppose, however, that such a *nexus* constituted an obligation would be quite erroneous. The person who rented a house had no *jus habitandi*, and the farmer had no *jus fruendi*. The hirer of a house had only a right to claim that the party who let it to him, should allow him to reside peaceably in the house he has rented.

A *dare* exists when something certain is the object of an obligation, as a *certa pecunia* or a *certa res* in the Quiritarian ownership of the debtor, which is to be delivered to the creditor. Again, every obligation in which there is not a *dare* is said “in *faciendo consistere*.” When the obligation consists in a *dare*, the *condictio certa* is applicable, and, what is of great importance to remember, the *intentio certa* was always required to be employed with a *dare oportere*. The “*intentio*” came immediately after the “*demonstratio*” or statement of the case. Gaius says that the “*intentio*” is that part of the formula in which the plaintiff sets forth his legal claim, as for example:—If it appears that Numerius Negidius *ought to give* to Aulus Agerius ten thousand sesterces. “*Si paret Numerium Negidium Aulo Agerio sestertium X millia dare oportere*.” iv. s. 41. This

form is peculiar to an obligation in a *dare*. With all other obligations the “*intentio*,” when introduced, is for an *incerta*. This marked distinction had its origin probably in the ancient mode of procedure known as the “*legis actio* ;” for originally when the obligation was connected or based upon a *dare*, the “*legis actio*” was “*per condictioem*,” whilst in all other cases of obligation, it was the “*legis actio per iudicis arbitrive postulationem*.” Thus we see that when the action was not for a *dare*, a freer form of procedure was allowable. Again, we have observed that all obligations were either *in dando* or *in faciendo*. What then are we to understand by an obligation *in præstando*. Such an obligation seems to be excluded by the remarks just made. How, it may be asked, could an obligation *in præstando* arise. It seems something quite new and foreign to the original and fundamental ideas of obligation. Von Vangerow is of opinion that this kind of obligation arose later in time and after the “*actiones in factum conceptæ*” came into use. These actions admitted of no “*intentio*” and after a statement of the facts contained in the “*demonstratio*,” there followed immediately upon it the “*condemnatio*.” It was to obligations in which there was no *dare oportere*, and no *facere*, and consequently no *intentio*, that the indefinite term *præstare* was applicable. Thus to sum up the previous remarks we may classify obligations as follows:—

Obligationes *in dando* with the formula *in dare oportere*.

Obligationes *in faciendo* with the formula *in facere oportere*.

Obligationes *in factum* without an *intentio* with the formula *in præstare*.

As to the origin of obligations, they arise either from contracts, *ex contractibus*; or out of certain civil injuries, and are then said to be *ex delictis*. In the later law obligations arose also from other sources. Not, however, that the circle which surrounded contracts and delicts was enlarged; but new obligations belonging to neither category were engendered. Thus Gaius says, “*Obligationes aut ex con-*

tractu nascuntur, aut ex maleficio, aut proprio quodam jure ex variis causarum figuris." l. l. pr. de oblig. et act. (44. 7.) In the later system of obligations there were three grounds from whence they sprang; and for an exact comprehension of the law, it is of importance to ascertain and mark the circumstances from which these changes arose.

89. Et prius videamus de his quæ ex contractu nascuntur. Harum quattuor genera sunt: aut enim re contrahitur obligatio, aut verbis, aut litteris, aut consensu.

90. Re contrahitur obligatio velut mutui datione. Quæ proprie in his fere rebus contingit quæ [res] (d) pondere, numero, mensura constant: qualis est pecunia numerata, vinum, oleum, frumentum, æs, argentum aurum. Quas res aut numerando aut metiendo aut pendendo in hoc damus, ut accipientium fiant et quandoque nobis non eadem, sed alia ejusdem naturæ redantur: unde etiam mutuum appellatur est, quia quod ita tibi a me datum est ex meo tuum fit.

89. And first let us investigate those obligations which arise from contracts. Of these there are four kinds; for an obligation is contracted either by a Thing (*re*), by words (*verbis*), by writing (*litteris*), or by consent (*consensu*).

90. A real obligation (*re*) is contracted, for example, by the gift of a *mutuum*. This is usually applicable to those things which are estimated by weight, number, or measure; such as coined money, wine, oil, copper, silver, gold. For whether we give such things by number, measure, or weight, we surrender them so completely that they become the property of him who receives them, and at no time are the *same things* restored to us, but others of the like nature. Whence this is called a *mutuum*, because that which has been thus given by me to you passes from my property to yours.

(d) Gneist has put the word *res* in brackets, which Huschke says Goeschen has very properly erased. The copyist took *pondere* for a verb, and appears to have written *respondere*, which induced him to alter *quæ* into *qua*, leading to the further change of *constat* instead of *constant*. The text of Gneist, it is certain, corresponds better than the older reading with the number and length of the words. Kritik, p. 61.

91. Is quoque qui non debitum accepit ab eo qui per errorem solvit re obligatur. Nam proinde ei condici potest SI PARET EUM DARE OPORTERE, ac si mutuum accepisset. Unde quidam putant pupillum aut mulierem cui sine tutoris auctoritate non debitum per errorem datum est non teneri condictione, non magis quam mutui datione. Sed hæc species obligationis non videtur ex contractu consistere, quia is qui solvendi animo dat magis distrahere vult negotium quam contrahere.

91. He also who receives from another a payment made by mistake, and not due to him, contracts a *real* obligation. For he can be sued under that form of *condictio* beginning "if it shall appear that he ought to give" (*si paret eum dare oportere*) in the same way as if he had received a *mutuum*. Whence some think that a pupil or a woman—to either of whom something not due has been given in mistake and without the authority of the tutor—is not bound by the *condictio* any more than by a gift in *mutuum*. But this species of obligation does not seem to be essentially one of *contract*; since he who gives with the intention of making a payment desires rather to dissolve an engagement than to contract one.

JUST. iii. 14. 1.

92. Verbis obligatio fit ex interrogatio et responsione, velut: DARI SPONDES? SPONDEO; DABIS? DABO; PROMITTIS? PROMITTO; FIDE PROMITTIS? FIDE PROMITTO; FIDE JUBES? FIDE JUBEO; FACIES? FACIAM.

92. A *verbal* obligation is contracted in the form of question and answer; for example, Do you engage to give? I engage; Will you give? I will give; Do you promise? I promise; Do you promise on your honour? I promise on my honour; Do you become bail? I do become bail; Will you act? I will act.

93. Sed hæc quidem verborum obligatio: DARI SPONDES? SPONDEO, propria civium Romanorum est, ceteræ vero juris gentium sunt; itaque inter omnes, homines, sive cives Romanos sive peregrinos, valent. Et quamvis ad Græcam vocem expressæ fuerint, velut hoc modo: [δῶσεις; δώσω, ὁμολογῆς; ὁμολογῶ, πίστει κελεύεις; πιστει κελεύω, ποιήσεις; ποιήσω]; etiam hæc tamen inter cives Romanos

93. But this form of verbal obligation—Do you engage to give? I engage (Dari spondes? spondeo)—is peculiar to Roman citizens, the other forms pertain to the *jus gentium*, and therefore are valid amongst all men, whether Roman citizens or foreigners. And although they may be expressed in the Greek language, as in this manner—Will you give? I will give; Do you promise? I promise; Are you bound on your ho-

valent, si modo Græci sermonis intellectum habeant. Et e contrario quamvis Latine enuntientur, tamen etiam inter peregrinos valent, si modo Latini sermonis intellectum habeant. At illa verborum obligatio: *DARI SPONDES? SPONDEO*, adeo propria civium Romanorum est, ut ne quidem in Græcum sermonem per interpretationem proprie transferri possit; quamvis dicatur a Græca voce figurata esse.

nour? I am bound on my honour. Will you do it? I will do it—these forms are valid among Roman citizens, if indeed they understand the Greek language. And on the other hand, although these formulæ are spoken in Latin, they are binding upon foreigners provided such persons understand the Latin language. But that form of verbal obligation—*Dari spondes? spondeo*—is so peculiar to Roman citizens that it cannot be transferred by interpretation into the Greek language, although it is said to have been derived from a Greek word.

94. Unde dicitur uno casu hoc verbo peregrinum quoque obligari posse, velut si Imperator noster principem alicujus peregrini populi de pace ita interroget: *PACEM FUTURAM SPONDES?* vel ipse eodem modo interrogetur. Quod nimium subtiliter dictum est; quia si quid adversus pactionem fiat, non ex stipulatu agitur, sed jure belli res vindicatur.

94. It is, however, said that in one case a foreigner can contract an obligation by this formula: for example, if our Emperor should interrogate the prince of a foreign people concerning peace in these words, “Do you engage that there shall be peace? (*pacem futuram spondes*);” or if the Emperor himself were interrogated in the same manner. But the case thus put is too subtle; because if the compact is broken, the remedy is not by the action *ex stipulatu*, but the matter is decided by the rights of war.

95. Illud dubitari potest, si quis.
(e) *Lineæ 24 vacuæ.*

95. It can be doubted whether any one. . . .

(e) It is probable that in this section, of which only a fragment has been preserved, Gaius considered whether it were necessary for both the stipulator and promissor to employ the same language, or if they could use different tongues, provided they understood each other. Theophilus in his paraphrase makes the following statement. “Also, it makes no difference when a stipulation was entered into,

whether the Roman or Greek languages, or indeed any other, as for example, the Syriac or Egyptian were employed, if only the contracting parties understood what was said. Nor was it indeed necessary that they should use one and the same language, but it was sufficient when the answer which was given accorded with the question asked; for example, if you had asked me, *Promittis*, I might answer, *ὁμολογῶ*; or on the other hand, if you had asked me *ὁμολογεῖς*, I might answer *Promitto*." Theoph. trib. b. tit. 15. ss. 1. This was, however, not legal by the earlier law of Rome, as will be hereafter seen.

96. . . . obligentur: utique *cum* quæritur de jure Romanorum. Nam apud peregrinos quid juris sit, singularum civitatum jura requirentes aliud in alia lege reperimus. (f)

96 . . . they are bound; undoubtedly when we enquire according to Roman law. For if we seek what may be the law amongst foreigners, with respect to the legal rights of each form of citizenship, we find one thing in one law, and another thing in another.

(f) Huselike thinks that in the first part of the section Gaius had without doubt treated of the question whether a person can be bound *verbis* by a unilateral verbal promise without the asking of a previous question. In relation to this subject, Gaius had probably stated in the main what we still read in the *Epit.* ii. 9. secs. 3, 4. Perhaps, having previously presented the case to which the words in sec. 96 refer (*illud dubitari potest, si quis*) that the promissor answered with a different word from that with which he had been interrogated. *l. 1. s. 2. de verb. obl.* (45. 1.) This part of the treatise probably closed with the opinion that by means of a "*jurata promissio*" only freed slaves could be bound to their patron for gifts or services. See *Epit.* s. 4. fin. This was so according to Roman law "*utique cum quæritur de jure Romanorum*." At the close of the section the word *lex* is used in the sense in which it was employed by the peregrini. *Kritik*, 61.

97. Si id quod dari stipulamur tale sit, ut dari non possit, inutilis est stipulatio: velut si quis hominem liberum quem servum esse credebatur aut mortuum quem vivum esse credebatur aut locum sacrum vel religiosum quem putabat esse humani juris, sibi dari stipuletur.

97a. Item si quis rem quæ in rerum natura non est aut esse non potest velut hippocentaurum stipuletur, æque inutilis est stipulatio.

98. Item si quis sub ea condicione stipuletur quæ existere non potest, veluti si digito cælum tetigerit, inutilis est stipulatio. (g) Sed legatum sub impossibili condicione relictum nostri præceptores proinde valere putant, ac si ea condicio adjecta non esset: diversæ scholæ auctores non minus legatum inutile existimant, quam stipulationem. Et sane vix idonea diversitatis ratio reddi potest.

97. If what we stipulate should be given is such a thing that it cannot be given, the stipulatio is inoperative, (*inutilis*); for example, if we stipulate to give to any one a free man, thinking him to be a slave; or a dead slave thinking that he is alive; or a *locus sacer*, or *religiosus*, which we thought to be subject only to human law (*humani juris*).

97a. Again, if any one stipulate to give a thing which does not or cannot exist, as for example, a centaur (*hippocentaurus*), such a stipulation is equally invalid.

98. Further, if any one stipulate subject to a condition which cannot exist—for example, if he shall touch the sky with his finger—such a stipulation is void. But the doctors of our school think that a legacy left under an impossible condition is valid, just as if the condition had not been added. The writers of the opposite school regard the legacy as being equally void with the stipulation. And certainly a scarcely satisfactory reason can be given for any difference.

(g) To stipulate under a condition to do an impossible thing, as “If I touch the heavens with my finger,” is regarded as a mere utterance of pleasantries, and as no legal contract. Thus, such a stipulation was simply null and void. But supposing the stipulation had been, “If I do not touch the heavens with my finger,” in this case, since there was nothing to be done, the stipulation was considered as made without any condition, that is, as pure and simple. An impossible condition in a testament was struck out just as if it had never been made. Instit. de inutil. stip. (19. 11.) Domenget in loco.

99. *Præterea inutilis est stipulatio, si quis ignorans rem suam esse eam sibi dari stipuletur; nam id quod alicujus est, id ei dari non potest. (h)*

99. Moreover, a stipulation is inoperative if any one not knowing that a certain thing belongs to him shall stipulate that it shall be given to himself; for that which is already the property of any man cannot certainly be given to him.

(h) The text has been restored in this section from the conjecture of Goeschen.

100. Denique inutilis est talis stipulatio, si quis ita dari stipuletur? POST MORTEM MEAM DARI SPONDES? vel ita: POST MORIEM TUAM DARI SPONDES? valet autem, si quis ita dari stipuletur: CUM MORIAR DARI SPONDES? vel ita: CUM MORIERIS DARI SPONDES? id est ut in novissimum vitæ tempus stipulatoris aut promissoris obligatio conferatur. Nam inelegans esse visum est ex heredis persona incipere obligationem. Rursus ita stipulari non possumus: FRIDIE QUAM MORIAR, aut: FRIDIE QUAM MORIERIS, DARI SPONDES? quia non potest aliter intellegi pridie quam aliquis morietur, quam si mors secuta sit; rursus morte secuta in præteritum reducitur stipulatio et quodammodo talis est: HEREDI MEO DARI SPONDES? quæ sane inutilis est.

100. Lastly, this form of stipulatio is also invalid if any one stipulate that a thing be thus given, "Do you engage that it be given *after my death*?" or thus, "Do you engage that it be given *after your death*?" but it is valid if he stipulate for it to be given thus: "Do you engage it shall be given *when I die*?" or thus, "Do you engage it shall be given *when you die*?" that is, that the obligation should be deferred to the last moment of the life of the stipulator or promissor. For it seemed inequitable that an obligation should begin in the person of the heir. Again, we cannot stipulate thus: "Do you engage to give on the day before I die?" or "the day before you die," because the day before the death of any one cannot be ascertained except after death has happened; again, when death has happened, the stipulation refers to the past, and is somewhat like this: "Do you engage to give to my heir?" and this is certainly inoperative.

JUR. III. 19. 13.

101. Quæcumque de morte diximus, eadem et de capitis deminutione dicta intellegemus.

101. What we have said about death we understand to apply equally to *capitis deminutio*.

102. Adhuc inutilis est stipulatio, si quis ad id quod interrogatus erit non responderit: velut si sestertia x (i) a te dari stipuler, et tu *attamen* sestertium v milia promittas; aut si ego pure stipuler, tu sub condicione promittas. (j)

102. Moreover a stipulation is invalid if the reply does not correspond with the question; for example, if I stipulate that ten thousand sesterces be given by you, and you promise me only a sum of five thousand sesterces; or if I stipulate unconditionally (*pure*) and you promise under a condition.

(i) In the time of Justinian, in consequence of the changes in the coinage which had taken place after the time of Constantine, the pound of gold and silver became actual Roman money: and consequently were regarded as *pecunia numerata* and *ponderata*. Hence, at that time the passage in Gaius could not be understood otherwise than as if it had been said that the mere difference of the sum in the question and answer would make the whole stipulation void, whilst Gaius intended to present by it an apt illustration both as regards quality and quantity of an incongruous answer. See Huschke's Kritik, p. 65.

(j) Whenever in a stipulation the answer was given in a manner not conformable to the question, the stipulation was regarded as a mere nullity: for instance, when one party stipulated for ten aurei and the other party promised five—or when a stipulation was pure and simple, and the promise was given under a condition, or *vice versa*. Ulpianus says, however, “Si stipulanti mihi decem tu viginti respondeas, non esse contractam obligationem, nisi in decem, constat. Ex contrario quoque, si me viginti interrogante tu decem respondeas obligatio nisi in decem non erit contracta; licet enim oportet congruere summam, attamen manifestissimum est, viginti et decem inesse.” l. 1. s. 4. de verb. obl. (45. 1.) Paulus also says, “Diversa causa est summarum veluti; ‘decem aut viginti dari spondes?’ hic enim, etsi decem sponderis, recte responsum est, quia semper in summis id, quod minus est, sponderi videtur.” l. 83. s. 3. tit. cit. (45. 1.) The compilers, however, of the Institutes took a different view. Instit. ss. 5, 18. de inutil. stip. (3. 19.)

103. *Præterea inutilis est stipulatio, si ei dari stipulemur cujus juri subiecti non sumus : unde illud quaesitum est, si quis sibi et ei cujus juri subiectus non est dari stipuletur, in quantum valeat stipulatio. Nostri præceptores putant in universum valere, et proinde ei soli qui stipulatus sit solidum deberi, atque si extranei nomen non adjecisset. Sed diversæ scholæ auctores dimidium ei deberi existimant, pro aliena. . . .*

(Linae 4 vacuæ.)

104. *Item inutilis est stipulatio, si ab eo stipuler qui juri meo subiectus est, vel si is a me stipuletur. Sed de servis et de his qui in mancipio sunt illud præterea juss observatur, ut non solum ipsi cujus in potestate mancipiove sunt obligari non possint, sed ne alii quidem ulli.*

105. *Mutum neque stipulari neque promittere posse palam est. Quod et in surdo receptum est : quia et is qui stipulatur verba promittentis, et qui promittit, verba stipulantis exaudire debet.*

106. *Furiosus nullum negotium gerere potest, quia non intellegit quid agat. (k)*

(k) If a madman had a lucid interval, he might make a valid contract during that period. "Is, cui bonis interdictum est, stipulando sibi acquirit; tradere vero non potest, vel promittendo obligari." 1. 6. de verb. obl. (45. 1.)

103. Moreover, a stipulatio is invalid, if we stipulate that something shall be given to one to whose power we are not subjected : hence, a question has arisen, how far the stipulation is valid, if any one stipulates for a gift to himself and to some one to whose power he is not subjected. The doctors of our school are of opinion that it is valid to the fullest extent, and that the whole is due to the stipulator alone, just as if he had not added the name of a third person. But the doctors of the opposite school are of opinion that the half is due to him, for . . .

104. Again, the stipulation is invalid if I shall stipulate by any one who is subjected to my power, or if he shall stipulate by me. But, moreover, as far as slaves and those who are in mancipium are concerned, this rule of law is observed, that not only can they not be bound to the person himself under whose *potestas* or *mancipium* they are, but not indeed to any other person.

105. It is evident that a dumb person can neither stipulate nor promise, and this restriction holds good in regard to the deaf : since he who stipulates ought clearly to hear the words of the promissor, and he who promises ought to hear the words of the stipulator.

106. A madman can transact no business, because he does not understand what he is engaged in.

107. Pupillus omne negotium recte gerit: ita tamen ut tutor, sicubi tutoris auctoritas necessaria sit, adhibeatur, velut si ipse obligetur; nam alium sibi obligare etiam sine tutoris auctoritate potest.

107. A pupil may legally transact any kind of business, however the authority of the tutor, so far as it is necessary, must be made use of; for example, if the pupil wishes to enter into an obligation, still he may place another under obligation to him without the authority of his tutor.

108. Idem juris est in feminis quæ in tutela sunt.

108. The same rule of law is applicable to women who are under the *tutela*.

109. Sed quod diximus de pupillis, atque de eo verum est qui jam aliquem intellectum habet: nam infans et qui infanti proximus est non multum a furioso differt, quia hujus ætatis pupilli nullum intellectum habent: sed in his pupillis per utilitatem benignior juris interpretatio facta est. (l)

109. But what we have said of pupils is certainly true of one who is in possession of a certain degree of intelligence; for an infant, and one very near infancy, differ not much from one bereft of reason; for pupils of this age have not any legal capacity; but with respect to these pupils, for their advantage a more favourable interpretation of the law has been made.

(l) With respect to the pupil, it was held that when he was able to pronounce the required words, he was capable of making a valid stipulation, and that without the authority of his tutor, for he was always permitted to make his condition better, and he was able to promise *verbis* with the auctoritas of the tutor. Moreover it was considered that only a minor of seven years of age could pronounce the necessary words of interrogation or the reply. This was the result of an interpretation in favour of the pupil, which permitted the pupil *proximus infantie* to be a party to a verbal contract, for in the early law only those pupils were recognized as capable of contracting who possessed *aliquid intellectum*; that is to say, those who were *proximus infantie*. l. 14. Dig. de sponsal. (23. 1) l. 18. Cod. de jure delib. (8. 58) Domenget in loco.

110. Possumus tamen ad id quod stipulamur alium adhibere qui idem stipuletur, quem vulgo adstipulatorem vocamus.

111. Sed huic proinde actio competit, proindeque ei recte solvitur ac nobis. Sed quidquid consecutus erit mandati iudicio nobis restituere cogetur.

112. Ceterum potest etiam aliis verbis uti adstipulator, quam quibus nos uti sumus. Itaque si verbi gratia ego ita stipulatus sim; DARI SPONDES? ille sic adstipulari potest; IDEM FIDE TUA PROMITTIS? vel IDEM FIDE JUBES? vel contra. (m)

110. Still we may unite with ourselves another person to stipulate the same thing that we stipulate, who is commonly called the adstipulator.

111. An actio may be brought against him, and payment may legally be made to him just as to ourselves. But whatever he may obtain he is compelled to restore to us by the *actio mandati*.

112. But the adstipulator may also employ other words than those which we have used. Therefore, if for example, I have so stipulated "Do you engage to give (*dari spondes*)?" he can thus adstipulate. "Do you promise the same thing on your honour (*idem fide tua promittis*)?" or "Do you become bail for the same (*idem fide, jubes*)?" or the opposite.

(m) The importance of the *Stipulatio* in Roman Law renders it needful that the attention of the student should be especially directed to its consideration. The essence of the Stipulation consisted in this, that it was an external simple form by which a *unilateral* agreement might be made into an actual contract. A *bilateral* agreement could never be brought about by means of a *single* stipulation. It might, however, be put into two distinct stipulations, in which case each stipulation would be independent of the other. First, the form of the *Stipulatio* was the following: the creditor who was the promissor put the substance of the intended contract into a question expressed in a precise form of words, as for example: "Do you promise me so-and-so?" The future debtor in reply must in the same form of words declare himself prepared to enter into the obligation. The answer of the promisee was required to be in a verbal and congruent form. Thus the creditor asked,

“*Spondesne mihi centum dare?*” He must not answer *promitto*, but *spondeo*. The *catch-word*, or, as the German jurists call it, the “*Stichwort*,” was always to be carefully observed, or no agreement was perfected. Thus the words given as examples of such congruent questions and answers are the following :

“*Spondesne?—Spondeo.*”

“*Dabisne?.....—Dabo.*”

“*Prommittisne?—Promitto.*”

The *Sponsio* gave rise to a strictly civil obligation; and without the question and answer in the manner explained there could be no legal stipulation. It was only possible for Roman citizens who used the Roman language to enter into contractual obligations by means of the formula, “*Spondesne—Spondeo.*” The other forms of stipulation however, might be in Greek, and were not confined in their use to Roman citizens. iii. 92—94. During the time of the classical jurists, this strict mode of stipulation was fully acknowledged, and it was not till the reign of the Emperor Leo, that any relaxation in this exactness of expression was permitted. He ordained that the repetition of what, for want of a better term, we are obliged to call the “*catch-word*,” should not invalidate the contract, if only a real agreement was maintained between the question and answer. “*Omnes stipulationes, etiamsi non solemnibus vel directis, sed quibuscunque verbis consensu contrahentium compositæ sunt, legibus cognitæ suam habeant firmitatem.*” l. 10. Cod. de contr. et com. stip. (8. 38.) Thus, if to the question “*Spondesne*,” the answer given were “*Dabo*,” the stipulation was regarded as valid. Indeed, according to the Digest, words not having the slightest connection with the legal formula might be introduced, and the answer still be construed as congruous.

Thus, supposing the question were, “*Spondesne centum dare?*” and the person answered, “*Arma virumque cano, Spondeo*,” this absurd interpolation did not vitiate the agreement, for so far as it was congruent it was valid.

Hence, Florentinus says, “*Quæ extrinsecus, et nihil ad præsentem actum pertinentia adjeceris stipulationi, pro supervacuis habebuntur, nec vitiabunt obligationem, veluti si dicas: Armis virumque cano, Spondeo, nihilo minus valet.*” l. 65. Dig. de verb. oblig. (45. 1.) Instit. s. 1. de verb. oblig. (3. 15.) But although this doctrine was received by many of the jurists, there were some who disputed the validity of such stipulations. By consulting and comparing the following passages, the different opinions will be manifest; and it will be found that what may be denominated as the milder view prevailed. l. 1. secs. 4. 5. l. 83. secs. 2. 3. 4. de verb. oblig. (45. 1.) Gai. iii. 102. Instit. s. 5. de inutil. stip. (3. 17.)

Secondly—Besides the stipulation, there were also *cautiones* in writing, containing the question and answer, as well as the signature, of the parties to the stipulation. It oftentimes happened that the question and answer were agreed upon and reduced to writing before the period of the stipulation: the document not only setting forth the formal words but also containing the subject matter of the contract. Such *cautiones* in connection with stipulations were no doubt of very frequent occurrence; but it would be quite erroneous to suppose that they constituted the essence of the contract. They only furnished documentary evidence of the existence of a stipulation between the parties, for the agreement was still held to be strictly *verbal* and by no means *literal*. No doubt, however, in the course of time the formal and verbal part of the stipulation came to be neglected, the contracting parties trusting simply to the written *cautiones* to which they had subscribed their signatures. It is easy to perceive that persons wishing to relieve themselves from a burdensome contract would be eager at times to set aside these *cautiones*, on the ground that the formal words of stipulation had not been spoken, and such seems actually to have been the case; for Justinian ordained that the *cautiones* should be considered as indisputable proof that the words of stipulation had been duly uttered by the parties, unless an *alibi* could be proved by the party controverting the validity

of the written evidence. It must in an *alibi* be established that at the day and hour in which the signature to the *cautio* was subscribed and the stipulation took place, the person intended to be charged was absent. 1. 14. cod. de cont. stip. (8. 38.) s. 12. Instit. de inutil. stip. (3. 19).

Thirdly—There could be no stipulation to take effect after the death of the stipulator. The stipulation was between the parties themselves, whose obligations after death passed to their heirs. There might, however, be an *adstipulatio*, and we are indebted to Gaius for much light upon this difficult subject. The adstipulator, it appears, came accompanied by the stipulator, and the promissor was bound to both; so that after the death of the stipulator the adstipulator could institute an action and recover under the obligation; but he could not retain what he recovered, as he was bound by law to render it to the heirs of the stipulator. Gai. iii. 110—118. The second chapter of the renowned *lex Aquilia* referred to the subject of *adstipulatio*. This whole question was, for a very long period, involved in great obscurity; and it was impossible to determine what the Aquilian law referred to, in the chapter just mentioned, until the discovery of the Institutes of the great Commentator. 1. unica Cod. ut act. et ab hered. (4. 11). 1. 11. Cod. de contra. et com. stip. (8. 38).

Fourthly—A stipulation for a third party was invalid. Thus, supposing any one said, “*Spondesne mihi et or aut Titio centum dare.*” When the word *aut* was introduced, the stipulation was valid, and it was said that Titius, the third party, was “*solutionis causa adjectus.*” In the other case, the Sabinians held that the “*et Titio*” was to be struck out as if it had never been written. The Proculians maintained that there were two stipulations, that so far as concerned the principal stipulator it was valid, and that it was only invalid so far as Titius was concerned. This opinion was received in the later law of Justinian. 1. 10. Dig. de verb. oblig. (45. 1). s. 4. Instit. de inutil. stip. (3. 19)

Fifthly—The stipulation was also the mode in which what

were denominated correal obligations were effected. In this kind of obligation, which space does not allow of our discussing fully, there was, to use the language of the Jurists, “una eademque obligatio, una res; sed plures creditores vel plures debitores.” Instit. de duob. etc. (3. 16).

Lastly—When a stipulation was concluded an *obligatio stricti juris* arose, which entitled the creditor to the *condictio certa*, if the stipulation were for a *dare* and a *certa*; but if the object of the stipulatio were an *incerta*, or a *facere*, then the creditor was entitled to the *actio ex stipulatu*. The debtor, when the “*actio ex stipulatu*” was brought against him might repel it by the *exceptio doli*, in the time of the Aquilian law—the age of Cicero; but before this period the “*actio ex stipulatu*” could not be repelled. Instit. pr. de verb. oblig. (s. 15); Dig. si quis in jus voc. (2. 5.) l. 27. s. 7. Dig. de recep. qui arbit. (4. 8.) 4 pr. de usuris, etc. (22. 1.)

113. Item minus adstipulari potest, plus non potest. Itaque si ego sestertia x stipulatus sum, ille sestertia v stipulari potest; contra vero plus non potest. Item si ego pure stipulatus sim, ille sub condicione stipulari potest; contra vero non potest. Non solum autem in quantitate, sed etiam in tempore minus et plus intellegitur: plus est enim statim aliquid dare, minus est post tempus.

113. We can also adstipulate for a less amount than the stipulated sum, but not for more. Thus, if I have stipulated for ten thousand sesterces, the adstipulator can stipulate for five thousand; but, on the other hand, he cannot stipulate for more than ten thousand. Again, if I stipulate without a condition, he can stipulate subject to a condition, but not *vice versa*. Moreover, the terms more and less (*plus et minus*) are understood as applicable not only to quantity, but to time; *plus* is to give something immediately; *minus* is used when the time is deferred.

114. In hoc autem jure quædam singulari jure observantur. Nam adstipulatoris heres non habet actionem. Item servus adstipulando nihil agit, qui ex ceteris omnibus causis

114. Moreover with respect to this branch of law, certain special rules are observed. For the heir of the adstipulator has no right of action (*actio*). Again, if a slave

stipulatione domino acquirit. Idem de eo qui in mancipio est magis placuit; nam et is servi loco est. Is autem qui in potestate patris est, agit aliquid, sed parenti non acquirit; *quamvis* ex omnibus ceteris causis stipulando ei adquirat. Ac ne ipsi quidem aliter actio competit, quam si sine capitis diminutione exierit de potestate parentis, veluti morte ejus aut quod ipse flamen Dialis inauguratus est. Eadem de filia familias, et quæ in manu est, dicta intellegemus.

who in all other cases of stipulation acquires for his master, should adstipulate, his act is entirely void. According to the more correct opinion, the same thing holds good with regard to one who is in mancipium, for he is in the place of a slave. Moreover, one who is under the power of his father performs a valid act, but he does not acquire for his agnate ascendant, although in all other cases the acquisition is made for him. Also the *filius-familias* cannot use the actio unless he has passed from under the potestas without a *capitis diminutio*, as for example, by the death of the pater-familias, or because he has himself been appointed a priest of Jupiter (*Flamen Dialis*). We wish all this to be understood as applicable to a *filia-familias* and to a woman who is *in manus*.

115. Pro eo quoque qui promittit solent alii obligari, quorum alios sponsores, alios fidepromissores, alios fidejussores appellamus. (n)

115. It is also usual for others to be bound as sureties for the promissor, some of whom we call *sponsors*, others *fidepromissors*, others *fidejussors*.

(n) A sponsor was one who made himself security for the debt of another person by means of a stipulatio. This was the most ancient way of giving security, and the formal words employed to obtain it were "Idem dari spondes?" A fidepromissor was also one who bound himself for the debt of another person, but in his case the words employed were "Idem fide (tua) promittis?" In the later law this mode of security disappeared. A fidejussor was a person who, by means of a stipulation, allowed himself to become liable with the debtor for his debt; so that he was a co-debtor. The intending fidejussor had the question put to him, "Idem fide tua esse jubes?" to which interrogation he answered "Jubeo." By the lex Furia, both sponsors and

fidepromissors were freed from all liabilities after the space of two years, which probably ran from the time the demand arising out of the obligation became due. Fidejussores were never released from their obligation by length of time, and each was liable for the whole sum; but by a rescript (*epistula*) of Hadrian the creditor was required to sue the solvent fidejussores separately, each according to his proportion. A *lex Apuleia*, passed before the *lex Furia*, gave one of several sponsors or fidepromissores, who had paid more than his share, an action against the rest for contribution. A fidejussor who had been compelled to pay the whole amount had no redress if his principal became insolvent. Hermann's *Handlexicon*, sub *vocib.* *Dict. Gr. and Rom. Antiq.* article "*Intercessio.*" *Gai.* iii. s. 92. 112.

116. *Sponsorita interrogatur: IDEM DARI SPONDES? fidepromissor: IDEM FIDEPROMITTIS? fidejussor ita: IDEM FIDE TUA ESSE JUBES? videbimus de his autem, quo nomine possint proprie adpellari, qui ita interrogantur: IDEM DABIS? IDEM PROMITTIS? IDEM FACIES?*

116. A sponsor is questioned in the following manner: "Do you engage that this thing shall be given?" The *fidepromissor*, "Do you promise on your honour," and the *fidejussor* thus, "Do you bind yourself as surety for the thing?" We shall however see by which name those are specially designated who are thus interrogated, "Will you give this thing?" Do you promise it? Will you do it?

117. *Sponsores quidem et fidepromissores et fidejussores sæpe solemus accipere, dum curamus ut diligentius nobis cautum sit. Adstipulatorem vero fere tunc solum adhibemus, cum ita stipulamur, ut aliquid post mortem nostram detur: quod cum stipulando nihil agimus, adhibetur adstipulator, ut is post mortem nostram agat: qui si quid fuerit consecutus, de restituendo eo mandati judicio heredi nostro tenetur.*

117. We are generally accustomed to make use of *sponsors*, *fidepromissors*, *fidejussors*, when we are seeking some additional security. But we scarcely ever have recourse to an *adstipulator*, except when we stipulate that something shall be given after our death; for since such a stipulation is void, we make use of the *adstipulator* in order that he may act after our death, and if he shall have received anything, he is bound, by the *actio mandati*, to restore the same to our heir.

118. *Sponsoris vero et fidepromissoris similis condicio est, fidejussoris valde dissimilis.*

118. The conditions of the *sponsor* and the *fidepromissor* resemble each other, that of the *fidejussor* is very dissimilar.

119. *Nam illi quidem nullis obligationibus accedere possunt nisi verborum; quamvis interdum ipse qui promiserit non fuerit obligatus, velut si femina aut pupillus sine tutoris auctoritate, aut quilibet post mortem suam dari promiserit. At illud quæritur, si servus aut peregrinus spoponderit an pro eo sponsor aut fidepromissor obligetur. Fidejussor vero omnibus obligationibus, id est sive re sive verbis sive litteris sive consensu contractæ fuerint, obligationes, adici potest. At ne illud quidem interest, utrum civilis an naturalis obligatio sit cui adiciatur; adeo quidem, ut pro servo quoque obligetur, sive extraneus sit qui a servo fidejussorem accipiat, sive dominus in id quod sibi debeat.*

119. For both the former (*sponsors* and *fidepromissors*) can accept no obligations except those which are *verbal*, although sometimes the promissor himself was not thus bound; as if a woman or a pupil shall promise without the authority of the tutor, or if any one promise that something shall be given after his death. But it is a question if a slave or a peregrinus has promised, whether the sponsor or *fidepromissor* is bound for him. On the other hand, a *fidejussor* was bound by obligations of all kinds, that is to say, whether they have been contracted as real or verbal, or written, or consensual obligations. But it makes no difference whether the obligation to which he is made a party be a civil or a natural one. Thus, indeed, he may also be made liable on behalf of a slave, and this whether a *fidejussor* has been accepted from the slave by an *extraneus*, or by the master of the slave on account of anything which may be due to him.

120. *Præterea sponsoris et fidepromissoris heres non tenetur, nisi si de peregrino fidepromissore quæramus, et alio jure civitas ejus utatur: fidejussoris autem etiam heres tenetur. (o)*

120. Moreover the heir of a *sponsor* and of a *fidepromissor* is not bound, unless the case be that of a foreigner who is a *fidepromissor* and whose state adopts a different law. But the heir of a *fidejussor* is held bound.

(o) Gaius explains fully the nature of the obligations by which *sponsors*, *fidepromissores*, and *fidejussores* were bound. Until the passing of the *lex Furia*, the two first-

mentioned securities were valid *in solidum*. In the ancient form of the law the *sponsores* were the co-promissors with the principal debtors, *fidejussio* having been invented to enable a stranger to become security in a verbal obligation. See ii. 92, 93. *Fidejussores* were sureties for all kinds of obligations, not only legal but also natural ones. See iii. 118, 119. The debtor who proposed to appoint sureties was compelled to give public notice of the sum for which they were to be bound, and the number of sureties appointed. It was enacted by the *lex Cornelia* that no person should bind himself for the same debtor to the same creditor in the same year for more than 20,000 sesterces. In the ancient law, the rule as to sureties was very exacting, as it placed them entirely at the mercy of the creditors.

121. Item sponsor et fidepromissor per legem Furiam biennio liberantur; et quotquot erunt numero eo tempore quo pecunia peti potest, in tot partes deducitur inter eos obligatio, et singuli viriles partes dare jubentur. Fidejussores vero perpetuo tenentur; et quotquot erant numero, singuli in solidum obligantur. Itaque liberum est creditori a quo velit solidum petere. Sed ex epistula divi Hadriani compellitur creditor a singulis, qui modo solvendo sint, partes petere. Eo igitur distat hæc epistula a lege Furia, quod si quis ex sponsoribus aut fidepromissoribus solvendo non sit, non augetur onus ceterorum, quotquot erunt. Cum autem lex Furia tantum in Italia locum habeat, consequens est, ut in provinciis sponsores quoque et fidepromissores proinde ac fidejussores in perpetuo teneantur et singuli in solidum obligentur, nisi ex epistula divi Hadriani hi quoque adjuvari videantur. (p)

121. Again, by the *lex Furia*, the sponsor and the fidepromissor are at the end of two years freed from the obligation; and the obligation is divided amongst them into as many shares as there are persons liable at the time when the debt becomes due, each one being bound to pay an equal share. But *fidejussors* are held to be liable without limitation of time, and whatever may be their number, each is bound for the whole, (*in solidum*) and thus the creditor is at liberty to sue any one he pleases for the whole. But by a rescript of Hadrian, the creditor is compelled to claim their shares from each and all of those who are solvent at the time. The rescript differs from the *lex Furia* in this respect, that if any one of the sponsors or fide promissors be insolvent, the claim on the others, how many so ever they may be, is not increased. But since the *lex Furia* extends only to Italy, it follows that in the provinces *sponsors* and *fide. promissors* are bound in the same manner as *fidejussors*, without limi-

tation of time, and each is under obligation for the whole, except so far as it appears that these also are relieved by the rescript of Hadrian.

(p) The *lex Furia*, also called *Testamentaria*, limited the amount which a testator might give as a legacy or as a *donatio mortis causa*. See note to sec. 2. 227; Ulp. Frag. tit. 1. s. 2. tit. 28, s. 7.

122. Præterea inter sponsores et fidepromissores *lex Apuleia* quandam societatem introduxit. Nam si quis horum plus sua portione solverit, de eo quod amplius dederit adversus ceteros actionem habet. *Lex autem Apuleia ante legem Furiam lata est, quo tempore in solidum obligabantur: unde quæritur, an post legem Furiam adhuc legis Apuleiæ beneficium supersit. Et utique extra Italiam supersit; nam lex quidem Furia tantum in Italia valet, Apuleia vero et in ceteris præter Italiam regionibus. Alia sane est fidejussorum condicio; nam ad hos lex Apuleia non pertinet. Itaque si creditor ab uno totum consecutus fuerit, hujus solius detrimentum erit, scilicet si is pro quo fidejussit solvendo non sit. Sed ut ex supradictis apparet, is a quo creditor totum petit, poterit ex epistula divi Hadriani desiderare, ut pro parte in se detur actio.*

122. Moreover, between *sponsores* and *fidepromissores* the *lex Apuleia* has introduced a species of co-partnership. For if any one of these has paid more than his share, he has a right of action against the others for the amount he has paid in excess. But the *lex Apuleia* was passed before the *lex Furia*, at which time each was bound for the whole. On this account it is questioned whether after the passing of the *lex Furia*, the benefit secured by the *lex Apuleia* survived. But in any case it survives beyond the confines of Italy, for the *lex Furia* is only operative in Italy, but the *lex Apuleia* in other districts beyond Italy. The condition of fidejussores is certainly different, since to them the *lex Apuleia* does not apply. Thus, if a creditor has obtained the whole of his debt from one the loss will fall on that one alone, as is the case if the person for whom he was surety be insolvent. But as it appears from what we have said above, he from whom the creditor seeks the whole, could require under the rescript of Hadrian, that the suit should be prosecuted against him for his share only.

123. Præterea lege (q) . . cautum est, ut is qui sponsores aut fidepromissores accipiat prædicat palam

123. Moreover it was provided by the *lex* . . . , that he who would accept sponsores or fidepromissores

et declaret et de qua re satis accipiat, et quot sponsors aut fidepromissores in eam obligationem accepturus sit: et nisi prædixerit, permittitur sponsoribus et fidepromissoribus intra diem xxx præjudicium postulare, quo quærat, an ex ea lege prædictum sit; et si iudicatum fuerit prædictum non esse, liberantur. Qua lege fidejussorum mentio nulla fit: sed in usu est, etiamsi fidejussores accipiamus, prædicere.

should publicly announce and declare for what sum he accepts the security, and how many sponsors or fidepromissors he will accept for the obligation; and unless he shall have made the declaration, the sponsors and the fidepromissors are permitted within thirty days to demand a preliminary enquiry (*præjudicium*) in order to ascertain, whether the announcement has been made in accordance with that law; and if it shall be judicially decided that the declaration has not been made, they (the sureties) will be freed from liability. In this law there is no mention made of fidejussors, but the practice is to make a public declaration if we also accept fidejussors.

(q) The name of the law is illegible in the MS. Boecking proposed to read "Porcia," Hollweg "Petreia," Haubold and Heffter "Apuleia." This reading has been followed by Domenget. Dirksen reads "Cornelia," Lachmann "Crepereia," and Huschke "Pompeia." The latter reading was approved by Boecking. Huschke thinks that this law was passed in 666 A. U. C. There appear to have been various *leges* called by this name. See Fest. sub voce "Unciaria," and Boecking's note on this section.

124. Sed beneficium legis Cornelie omnibus commune est. Qua lege idem pro eodem apud eundem eodem anno vetatur in ampliorem summam obligari creditæ pecuniæ (r) quam in xx milia; et quamvis sponsor vel fidepromissor in ampliorem pecuniam, velut si sestertium c millia se obligaverit, non tamen tenebitur. Pecuniam autem creditam dicimus non solum eam quam credendi causa damus, sed omnem quam tunc, cum contrahitur obligatio, certum est debitum iri, id est quæ sine ulla conditione

124. But the advantage of the *lex Cornelia* is common to all. By which law it is forbidden that any one should bind himself for one and the same debtor to the same creditor in the same year, for a larger sum of *credita pecunia* than twenty thousand sesterces; and although a sponsor or a fidepromissor shall have bound himself in a larger sum, for example in the sum of one hundred thousand sesterces, he will not be held liable. But we designate as *pecunia credita* not only that money which we give

deducitur in obligationem. Itaque et ea pecunia quam in diem certum dari stipulamur eodem numero est, quia certum est eam debitum iri, licet post tempus petatur. Appellatione autem pecuniæ omnes res in ea lege significantur. Itaque si vinum vel frumentum, et si fundum vel hominem stipulemur, hæc lex observanda est.

for the sake of constituting the relation of creditor and debtor (*credendi causa*), but everything which people engage to surrender in contracting an obligation; that is to say, whatever is made the subject of an obligation without any condition. Therefore also, that money which we stipulate to give on a fixed day is regarded as such, because it is certain that it will become due, although it is only demanded after the lapse of a definite time. But by the word *pecunia* in that law all kinds of things are signified. Therefore if we stipulate for wine or corn, and likewise for land or a slave, the provisions of this law must be observed.

(r) Gaius explains the meaning of the expression “*credita pecunia*.” In a more limited sense the expression is used as equivalent to “*mutuum dare, mutuum, mutua pecunia*.” Paulus says, “*Creditum ergo a mutuo differt, quia genus a specie; nam creditum consistit etiam extra eas res, quæ pondere, numero mensura continentur; sicut si eandem rem recepturi sumus, creditum est.*” 1. 2. s. 3. Dig. de reb. cred. etc. (12. 1.)

125. Ex quibusdam tamen causis permittit ea lex in infinitum satis accipere, veluti si dotis nomine, vel ejus quod ex testamento tibi debeatur, aut jussu judicis satis accipiatur. Et adhuc lege vicesima hereditatium cavetur, ut ad eas satisfactiones quæ ex ea lege proponuntur lex Cornelia non pertineat. (s)

125. Still in certain cases that law permits the acceptance of security without any limitation; for example, if a person is surety for a dower, or for anything due by virtue of a testament, or if bail is given by an order of the judge. And moreover it is provided by the law in relation to the five per cent tax upon inheritances (*lege vicesima hereditatium*), that the *lex Cornelia* shall not apply to the securities which are prescribed by that law.

(s) *Lex Cornelia*. It is now no longer a question, that the law relating to the *vicesima* referred to in the text, is the *lex Julia*, enacted 759 A.U.C., which deducted a twentieth part of the inheritance for the benefit of the State. Huschke says, “Non dubito, quin ipse Gaius in his institutionibus scripserit: lege nil. de vices. her.” Ins. in loco. This tax appears to have been paid into the military chest at the instigation of Augustus. It was levied both upon inheritances and legacies; but not upon property derived from near relatives, nor upon the poor. Peregrini and Latini although actual and near relatives, were for the purpose of this tax not considered as such, hence they had always to pay until relieved by an imperial constitution. Plin. paneg. 37, 38, 39. Procurators were appointed both in Italy and in the provinces for the collection of this impost. These officers of the revenue are referred to in many inscriptions as “Procuratores xx hereditatum,” or “ad vectigal xx hered.” Also “Statio xx hereditarium,” “promagistro xx hereditarium.” Orelli T. ii. n. 3320. Gruter p. 454, 8. Caracalla raised the tax to the *decima*, and in order to make it endurable, conferred the citizenship upon all the inhabitants of the Roman empire: but Macrinus, at whose instigation Caracalla was assassinated, repealed the additional amount imposed by his predecessor both on manumissions and inheritances; at the same time expressing his determination to abolish all unlawful exactions, both in the city and in the provinces. The tax appears to have been sold to the publicani for a round sum, which these officers paid to the authorities at Rome. Dio. Cass. lv. 25. lvi. 28. lxxvii. 9. lxxviii. 12. Capitol M. Anton. ii. Ulpianus seems to refer to this impost in the following passage: “Sed imperator noster in hereditatibus, quæ ab intestato deferuntur, eas solas personas voluit admitti, quibus decimæ immunitatem ipse tribuit. Mos. et Rom. Leg. Col. xvi. 9. 3. This tax appears to have existed at the time of Diocletian, but was subsequently abolished. 1. 3. cod. de edict. D. Hadr. toll. (6. 33). Walter Rechtsgeschich. s. 312.

126. In eo jure quoque juris par condicio est omnium, sponsorum, fidepromissorum, fidejussorum, quod ita obligari, non possunt, ut plus debeant quam debet is pro quo obligantur. At ex diverso ut minus debeant, obligari possunt, sicut in adstipulatoris persona diximus. Nam ut astipulatoris, ita et horum obligatio accessio est principalis obligationis, nec plus in accessione esse potest quam in principali re.

126. Also in one point the legal condition of all, of sponsors, of fidepromissors, of fidejussors, is the same, for they cannot so bind themselves that they shall be liable for more than is owing by him for whom they are bound. But on the other hand they may bind themselves so that they shall be liable for less, as we have already said in the person of the adstipulator. For their obligation, as also the obligation of the adstipulator, is an accession to the principal obligation, and in the accession there cannot be more than in the principal thing.

JUST. iii. 20. 5.

127. In eo quoque par omnium causa est quod si qui pro reo solverit, ejus recipiendi causa habet cum eo mandati judicium. Et hoc amplius sponsores ex lege Publilia propriam habent actionem in duplum, quæ appellatur *depensi*. (t)

127. In this also the condition of all is the same, that he who has paid for the principal debtor, has against him the *actio mandati*, for the recovery of that which he has expended. Sponsors, moreover, have by virtue of the *lex Publilia*, an action of their own for a *duplum* which action is called *depensi*.

(t) Compare Gai. iv. 9, 22, 25, also Gai. Epit. ii. 9. s. 2. where we read as follows: "Quædam de fidejussoribus habet, quæ unde originem traxerint, incertum est: Creditor autem qui pecuniam dedit in potestate habet ad reddendam pecuniam quem velit tenere, utrum ipsum debitorem an fidejussorem. Sed si debitorem tenere elegerit, fidejussorem absolvet; si vero fidejussorem tenuerit, debitorem absolvet: quia uno electo, quem idoneum creditor judicavit, alterum liberat."

128. Litteris obligatio fit velut in nominibus transcripticiis. Fit autem nomen transcripticium duplici modo, vel a re in personam, vel a persona in personam.

128. An obligation is created by writing (*litteris*), as by the transcription of debts in the house book. (*in nominibus transcripticiis*). Now this transcription of claims takes place in two ways, either from a

thing to a person (*a re in personam*), or from one person to another (*a persona in personam*).

129. *A re in personam transcriptio* fit, veluti si id quod *tu* ex emptionis causa aut conductionis aut societatis mihi debeas, id expensum tibi tulero.

129. The transcription from a thing to a person takes place, for example, if I enter as a debt against you that which you are indebted to me on the ground of a purchase, or a hiring, or of a partnership.

130. *A persona in personam transcriptio* fit, veluti si id quod mihi Titius debet tibi id expensum tulero, id est si Titius te delegaverit mihi. (u)

130. A transcription from the person to the person takes place, if I place as a debit against you, that which Titius owes to me; that is if Titius has referred me to you for the payment.

(u) Literal obligations were those which resulted from a writing. The Romans were in the habit of inscribing daily in a diary called a (*codex* or *tabula*) their expenses of every kind. Gaius illustrates this, by mentioning the “nomina transcripticia.” A creditor, having a debt due from a person, entered it in the house-book against the name of the person from whom it was due. Such an entry was called “nomen transcripticium.” It was called “transcriptio a persona in personam” when a creditor entered in his books a debt as due from a third person, which was really due from another person, but which that other party had transferred to the creditor.

This solemn entry in the house-book of a debt laid the foundation for a valid obligation. It is evident that in this way, as in the stipulatio, anything might be made the subject matter of an obligation. It was only necessary to enter the agreement made in the house-book, and it at once became a legal binding contract. This ceased after the times of the Republic; but in ancient Rome the house-book was universal and sacred; it resembled very much the ledger of the merchant in our day, only that it possessed a

legal and almost a religious character. *Pro Roscio Orat.* iii. s. 3.; *Theoph.* iii. tit. 21.

The praetor relieved the debtor, if he had not actually received the money, by permitting him to use as a plea, the "*exceptio non numeratæ pecuniæ*," by which the debtor alleged that he had never received the money. Previous to the time of Justinian, the debtor was allowed to avail himself of his remedy before the lapse of five years; the emperor reduced this to two, during which period he might use the legal means afforded him to get rid of his liability. l. 7. *Cod. de non num. pec.* (4. 30.); l. 4. *Cod. tit. cit.* (4. 30).

In an obligation made by a stipulation, there must be two parties present; in a literal contract, there was the party to whom a debt was owing, and another who inscribed it by arrangement with him in his house-book. In the stipulation certain solemn words were pronounced; in the contract *litteris*, special words needed to be written. Stipulation was a contract of the strict law, giving rise to an "*actio ex stipulatu*," or to a "*condictio certi*;" the contract *litteris* was also a contract of strict law, having as an *actio*, the "*condictio certi*." Again, stipulatio was rather employed for the purpose of making a particular contract, being frequently used to renew a pre-existing obligation. The literal contract was also employed to give rise to a particular contract; but especially for the purpose of transforming a pre-existing engagement into a written obligation. When Theophilus says that solemn words were used by the parties who wished to contract *litteris*, he probably means that the words inscribed required to be exact and formal. We learn from section 138, that a literal contract might be entered into, even when the parties were absent. Literal contracts could only be entered into for certain quantities. A stipulation, on the other hand, might be made for indeterminate ones. The *condictio certi* was alone applicable to the literal contract, and as this contract was always for a *certum* it is perfectly consonant that it should have been used for a *stipulatio certi*; whilst when the stipulation was

for an *incertum*, the *actio ex stipulatu* was the proper form l. 1. s. 9. Dig. de cred. (12. 1.); Instit. pr. de verb. oblig. (3. 15.) Domenget note to sec. 128. and in loco.

131. *Alia causa est eorum nomen quæ arcaria vocantur.* In his enim rei, non litterarum obligatio consistit: quippe non aliter valent, quam si numerata sit pecunia; numerato autem pecuniæ rei, non litterarum facit obligationem. Qua de causa recte dicemus arcaria nomina nullam facere obligationem. Sed obligationis factæ testimonium præbere.

132. *Unde proprie(v) dicitur arcariis nominibus etiam peregrinos obligari, quia non ipso nomine, sed numeratione pecuniæ obligantur: quod genus obligationis juris gentium est.*

131. It is quite otherwise with claims called *arcaria*. For in these there is a *real*, not a *literal* obligation, because they only become valid, by the counting out of the money paid; but the payment of money originates a *real* obligation, not a *literal* one. Therefore we correctly say that *arcaria nomina* give rise to no obligation, but furnish proof of a pre-existing one.

132. Hence it is properly said that foreigners (*peregrini*), may bind themselves by means of *arcaria nomina*, because they do not bind themselves by the claim (*nomen*) itself, but by the payment of the money. And this kind of obligation appertains to the *jus gentium*.

(*v*) Huschke at first asserted that *proprie* is without meaning, and that we must read *improprie*, as that expression is required by the reason adduced in the text. Subsequently, in his own edition of Gaius, he gives the reading, "unde non proprie" which Gneist has *not* adopted, and in his note on the passage does not use "improprie," but "non proprie." Thus, in iv. 18, we find the expression "nunc vero non proprie conditionem, etc."

133. *Transcripticiis vero nominibus an obligentur peregrini, merito quæritur, quia quodammodo juris civilis est talis obligatio: quod Nervæ placuit. Sabino autem et Cassio visum est, si a re in personam fiat nomen transcripticium etiam pere-*

133. But whether foreigners can be bound by entries in the house book, is not without reason a matter of doubt; because an obligation of this kind appertains in a certain manner to the civil law (*jus civile*). Such is the opinion of Nerva. But to Sabinus

grinos obligari; si vero a persona in personam, non obligari.

and Cassius, it seemed, that foreigners (*peregrini*) might be bound if the entry in the account book (*nomen transcripticium*) be from a thing to a person (*a re in personam*). But that if the transcription be from one person to another person (*a persona in personam*), they cannot be bound.

134. Præterea litterarum obligatio fieri videtur chirographis et syngraphis, id est si quis debere se aut datum se scribat; ita scilicet, si eo nomine stipulatio non fiat. Quod genus obligationis proprium peregrinorum est.

134. Moreover, it appears that a literal obligation may arise by *chirographa* and *syngrapha*, that is if any one writes that he is indebted or that he will give, provided that no stipulation has been made for the claim. This kind of obligation is peculiar to foreigners (*peregrini*).

DE CONSENSU OBLIGATIONE.

135. Consensu fiunt obligationes in emptionibus et venditionibus, locationibus conductionibus, societatibus, mandatis. (w)

OF CONSENSUAL OBLIGATIONS.

135. Obligations arise by consent in bargain and sale (*emptio venditio*), letting and hiring (*locatio conductio*), partnership (*societas*), and mandate (*mandatum*).

JUST. III. 22. pr.

(w) With respect to the different kinds of contracts to which Gaius is about to direct our attention, and which only gave rise to an obligation so far as the object had been delivered—a question put, and a reply conformable thereto given, or a writing made between the parties—there was an entire class which rested entirely upon the consent of the contractees. They comprehended *emptio venditio*, *locatio conductio*, *societas*, and *mandatum*. Domenget in loco.

136. Ideo autem istis modis consensu dicimus obligationes contrahi, quia neque verborum neque scripturæ ulla proprietas desideratur, sed sufficit eos qui negotium gerunt consensisse. Unde inter absentes quoque talia negotia contrahuntur, veluti

136. Therefore we say that obligations are contracted in these cases by consent, because there is not any need of stipulations, nor of any writing, but it suffices if the contracting parties are agreed. Hence also such legal transactions may be concluded

per epistolam aut per internuntium, cum alioquin verborum obligatio inter absentes fieri non possit.

between absent parties, as for instance by letter, or by means of an agent (*internuntium*), whilst a verbal obligation cannot arise between absent parties.

JUST. iii. 22. 1. 2.

137. Item in his contractibus alter alteri obligatur de eo quod alterum alteri ex bono et æquo præstare oportet, cum alioquin in verborum obligationibus alius stipuletur, alius promittat, et in nominibus alius expensum ferendo obliget, alius obligetur.

137. Again in these contracts both parties are mutually bound for that which they ought to perform the one to the other in good faith (*ex bono et æquo*), whilst in verbal obligations one stipulates and the other promises, and in literal contracts one binds the other by means of the transcription in the account book (*expensum ferendo*), and the other is bound by the obligation.

JUST. iii. 22. 3.

138. Sed absenti expensum ferri potest, etsi verbis obligatio cum absente contrahi non possit.

138. But such a literal contract may arise when the parties are absent from each other; although a verbal obligation cannot arise between absent parties.

DE EMPTIONE ET VENDITIONE.

139. *Emptio et venditio contrahitur cum de pretio convenerit, quamvis nondum pretium numeratum sit, ac ne arra quidem data fuerit. Nam quod arræ nomine datur argumentum est emptionis et venditionis contractæ. (x)*

CONCERNING BARGAIN AND SALE.

139. The contract of bargain and sale (*emptio venditio*) arises as soon as the price is agreed upon, although the money may not have been paid, and no earnest money (*arra*) have been given. For what is given as earnest money is simply a proof of the contract of bargain and sale.

JUST. iii. 3. 13. pr.

(x) In the contract of sale (*emptio venditio*), the vendor promised to deliver to the purchaser, for a certain sum called the *pretium*, some article that might be lawfully dealt with in commerce. This object of the contract called the “merx,”

might consist of anything that had a market value, whether corporal or incorporeal, or which could possibly be the subject of an agreement—money only excepted. As soon as there was a mutual consent between the buyer and seller in regard to the thing to be sold, and also as to the price, the “*emptio venditio*” was said to be *perfecta*. When the contract was perfected, all the risk (*periculum rei venditæ*), was transferred to the buyer, unless the sale were conditional, in which case the seller had the “*periculum interitus*,” that is the risk of utter loss, and the buyer the “*periculum deteriorationis*.” Again, if the things sold were either “*ad pondus*,” “*ad numerum*,” or “*ad mensuram*,” until they were either weighed, counted or measured, the *periculum* was with the seller. Again, if it were a dish of food to be eaten (*ad gustum*), until the viands were approved of the risk was still with the seller. The purchaser was protected by the “*actio emti*,” and the seller by the “*actio venditi*.” The giving of an “*arrha*” or earnest did not appertain to the perfection of the contract, but merely served for its confirmation. The seller was only liable for any defect in the article sold by the *jus civile* on the ground of a special promise or in consequence of “*dolus*” capable of being proved. The *Ædiles*, however, by their edicts, under certain unconditional circumstances relieved the purchaser from his bargain, when concealed faults had not been pointed out. The “*judicium redhibitorium*,” which must be employed within six months of the sale, was given to compel the seller to take back the thing and to give back the price, and the “*judicium æstimatorum*” within a year, was also given for an abatement in the price on the ground of fraud and force. According to a decision of Diocletian, if the price were less than half the true value of the thing, (*læsio ultra dimidium*) an action might be maintained for the rescission of the contract. l. 11. sec. 2. l. 25. Dig. de act. emt. vend. (19. 1). l. 1. sec. 1. l. 38. Dig. de ædil. edic. (21. 1). In the last passage will be found the form of the edicts of the *Ædiles*. Moehler’s *Pandect.* pp. 135—137. Sheurl’s *Instit.* sec. 132.

140. Pretium autem certum esse debet; alioquin si ita inter eos convenierit, ut quanti Titius rem aestimaverit tanti sit emptâ, Labeo negavit ullam vim hoc negotium habere; *quam sententiam* Cassius (y) probat: Ofilius et eam emptionem putat et venditionem; cujus opinionem Proculus secutus est.

140. But the price also ought to be fixed: otherwise, if the parties were to agree among themselves that the thing shall be sold for so much as Titius shall value it at, Labeo says that such a transaction is utterly invalid, which opinion Cassius approves of: Ofilius on the other hand, whose opinion Proculus followed, thinks that in this case there is a bargain and sale.

JUST. iii. 23. 1.

(y) The word *Cassius* in the text, although edited by Gneist, Boecking, and Huschke, is, according to the latter critic, quite incongruous to the passage: hence he proposes to read *nos*. Gaius very often mixes up himself and his reader in his explanations. Kritik. in loco p. 94.

141. Item pretium in numerata pecunia consistere debet. Nam in ceteris rebus an pretium esse possit, veluti homo aut toga aut fundus alterius rei pretium esse possit, valde quæritur. Nostri præceptores putant etiam in alia re posse consistere pretium; unde illud est quod vulgo putant per permutationem rerum emptionem et venditionem contrahi, eamque speciem emptionis et venditionis vetustissimam esse; argumento utuntur Græco Poeta Homero qui aliqua parte sic ait: (z)

Ἐνδ' ἐν ᾧ οἰνίζοντο καρηκομώντες
Ἀχαιοί,
"Ἄλλοι μὲν χαλκῷ, ἄλλοι δ'
αἰθωνί σιδήρῳ,
"Ἄλλοι δὲ ῥινοῖς, ἄλλοι δ' αὐτῇσι
βόεσσιν,
"Ἄλλοι δ' ἀνδραπόδεσσιν.

Diversæ scholæ auctores dissentiunt, aliudque esse existimant permutationem rerum, aliud emptionem et venditionem: alioquin non posse rem

141. Again the price ought to consist of coined money. For it is a question warmly disputed whether the price may be paid in other things besides; as for example, whether a slave, a toga, or a piece of land, can be given as the price of some other thing. The doctors of our school are of opinion, that the price also may be paid in some other things; whence also the common opinion, that a bargain and sale may be concluded by the exchange of things, and that this species of bargain and sale is indeed the most ancient; they employ as an argument the words of the Greek poet Homer, who somewhere thus speaks:

"There now the long-haired Greeks bought wine,
Some indeed with copper, others with shining iron,
Some indeed with skins, and others with the living steers,
Others with prisoners taken in battle."

expediri permutatis rebus, quæ videatur res venisse et quæ pretii nomine data esse; sed rursus utramque videri et venisse et utramque pretii nomine datam esse absurdum videri. Sed ait Cælius Sabinus, si rem Titio venalem habente, veluti fundum, acceperim, et pretii nomine hominem forte dederim, fundum quidem videri venisse, hominem autem pretii nomine datum esse, ut fundus acciperetur.

The founders of the opposite school hold a different opinion and think that the exchange of things is altogether diverse from bargain and sale: otherwise one could not distinguish in the case of things given in exchange, which should be regarded as the thing sold, and which as the price given for it: but again it appears to be absurd that the articles should be regarded both as sold, and at the same time as the price. But Cælius Sabinus says, that if I have received from Titius a thing which he has for sale, as for instance a piece of land, and I have given per chance a slave under the name of purchase money, the piece of land will be considered as the thing sold, and the slave as the price given in order to obtain the land.

JUST. iii. 23. 2.

(z) The extract is taken from the Iliad vii. 472—475. Gneist says that in the Veronese MS. the lines have been omitted; “a librario suo more omitta.” The same verses are cited by Paulus in l. 1. s. 1. Dig. de contra. emt. (18. 1) who treats this question more fully. See Ulp. l. 5. s. 1. Dig. præser. verbis. (19. 5) The price should be paid in money, otherwise the contract was one of exchange. In this the doctrine of Proculus was followed, who maintained that exchange was a species of contract distinct from sale. The seller was bound to guarantee the purchaser from eviction, and to warrant his undisturbed possession. l. 29. Dig. de evict. (21. 2) ll. 7. 14 cod. de evict. (8. 44).

DE LOCATIONE ET CONDUCTIONE.

142. Locatio autem et conductio similibus regulis constituuntur: nisi enim merces certa statuta sit, non videtur locatio et conductio contrahi.

OF LETTING AND HIRING.

142. Letting and hiring (*locatio et conductio*) are constituted in accordance with similar rules; for unless a definite rental is agreed upon, there appears to be no contract of letting and hiring.

JUST. iii. 24. pr.

143. Unde si alieno arbitrio merces permissa sit, velut quanti Titius æstimaverit, quæritur an locatio et conductio (a) contrahatur. Qua de causa si fulloni polienda curandave, sarcinatori sarcienda vestimenta dederim, nulla statim mercede constituta, postea tantum daturus quanti inter nos convenerit, quæritur an locatio et conductio contrahatur.

143. Hence it is asked whether a contract of letting and hiring is concluded, if the rental (*merx*) is to be fixed at the pleasure of a third person, as, for example, at what Titius shall have estimated. On which account also the question is raised, whether the contract of letting and hiring is concluded if I have given clothes to a fuller for the purpose of calendering or finishing, or to a tailor for repairs, without at the same time having agreed upon the price to be paid, engaging only to give that which we shall subsequently agree upon.

JUST. iii. 24. 1.

(a) "Locatio et Conductio," or, as the Germans call it, the "Pacht-und Miethvertrag," was a form of contract, in which the lessor (the locator) promised to the lessee (the conductor) for a rent (*merx*), the use of a certain object or thing. The *merx* must be *vera* and also *certa*, thus things, "quæ usu consumuntur vel minuuntur" were excluded from this form of obligation. The conductor was the person who promised to pay the price for the thing let. Sometimes the person entering into this contract was called the "conductor operis." If the price had not been agreed upon between the parties, nor referred to some third person named for that purpose, but had been left to be decided at a subsequent period by the contractors themselves, there was no contract of "locatio conductio," but simply, as was determined by Justinian, an innominate contract, with an action "in præscriptis verbis." Instit. s. 1. de loc. et cond. (3.24). Ulpianus says, "Locatum quoque et conductum jus gentium induxit. Nam ex quo cœpimus possessiones proprias et res habere, et locandi jus nacti sumus, et conducendi res alienas; et is qui conduxit jure gentium tenetur ad mercedem ex. . . ." libro Inst. ex Frag. ed Endlicher. There might be a conductio locatio rerum, either corporal or incorporeal; a locatio conductio operarum, that is of work to be done; and a locatio

conductio *operæ*, or of fruits. When lands were rented in perpetuity, the locatio conductio took the name of "emphyteusis," an important mode of tenure both in the civil and the common law, and regulated by its own peculiar characteristics.

144. Vel si rem tibi utendam dederim et invicem aliam rem utendam acceperim, quæritur an locatio et conductio contrahatur.

144. Or if I have given to you a thing to use, and in return I have received another thing for my use, the question is raised whether there be a contract of letting and hiring.

145. Adeo autem emptio et venditio et locatio et conductio familiaritatem aliquam inter se habere videntur, ut in quibusdam causis quæri soleat utrum emptio et venditio contrahatur, an locatio et conductio. Veluti si qua res in perpetuum locata sit, quod evenit in prædiis municipum quæ ea lege locantur, ut quamdiu id (b) vectigal præstetur, neque ipsi conductori neque heredi ejus prædium auferatur; sed magis placuit locationem conductionemque esse.

145. But bargain and sale (*emptio et venditio*), and letting and hiring (*locatio et conductio*), seem to have so strong a resemblance to each other, that in certain cases one is accustomed to ask, whether the contract is one of bargain and sale, or of letting and hiring. As for example, if anything has been rented in perpetuity, as happens in the case of municipal lands, which are rented under the condition that so long as the fee-farm rent (*vectigal*) is paid, the lands shall not be taken away from the lessee himself, nor from his heir. But this has been regarded rather as a letting and hiring (*locatio conductio*), than as a bargain and sale.

JUST. iii. 24. 3.

(b) It is proposed to read *inde* instead of *id*, which, although not accepted by Gneist, is adopted by Huschke in his edition of Gaius. In confirmation of this reading, Huschke refers to i. 19, where, in the quotation of Boethius just the opposite error has been made, namely, the alteration of *id* into *inde*. Similarly, in iii. 175, *ind* has been inserted for *id*, that is, *idem*, which Huschke has edited. Kritik. p. 36.

146. Item si gladiatores ea lege tibi tradiderim, ut in singulos qui integri exierint pro sudore denarii xx mihi darentur, in eos vero singulos qui occisi aut debilitati fuerint, denarii mille: quæritur utrum emptio et venditio, an locatio et conductio contrahatur. Et magis placuit eorum qui integri exierint locationem et conductionem contractam videri, at eorum qui occisi aut debilitati sunt emptionem et venditionem esse: idque ex accidentibus apparet, tamquam sub conditione facta cujusque venditione an locatione. Jam enim non dubitatur, quin sub conditione res veniri aut locari possint.

147. Item quæritur, si cum aurifice mihi convenerit, ut is ex auro suo certi ponderis certæque formæ annulos mihi faceret, et acciperet verbi gratia denarios cc, utrum emptio et venditio, an locatio et conductio contrahatur. Cassius ait materiæ quidem emptionem venditionem contrahi, operarum autem locationem et conductionem. Sed plerisque placuit emptionem et venditionem contrahi. Atq̃ui si meum aurum ei dedero, mercede pro opera constituta, convenit locationem conductionem contrahi. (c)

146. Again it is a question whether there is a contract of bargain and sale, or of letting and hiring, if when I have delivered gladiators to you under the condition, that for everyone that shall come out of the encounter safe and sound, twenty denarii shall be given to me, and that for every one who is slain or disabled one thousand denarii. The better opinion seems to be, that in the case of those who come out of the conflict unhurt, there is a contract of letting and hiring; but that in the case of those who are killed or mutilated, the contract is one of bargain and sale; and that the kind of contract is rendered apparent by the circumstances, each (of the gladiators) being sold or let, as if he were under an implied condition; for at the present time it is no longer doubted, but that a thing may be sold or let under a condition.

147. Again it is a question, if I contract with a goldsmith to make me a ring out of his gold, of a certain weight and of a certain form, and that he shall receive, for example, two hundred *denarii*, whether the contract is a bargain and sale or a letting and hiring. Cassius says, "that in reference to the material the contract is one of bargain and sale, but with respect to the workmanship it is one of letting and hiring." But the general opinion is that the contract is one of bargain and sale; yet if I had given him my gold, and the price for his workmanship had been agreed upon, then without doubt a contract of letting and hiring would be concluded.

JUST. iii. 24. 4.

(c) The principal obligation of the locator was to secure for the lessee the enjoyment of the thing rented during the

period fixed. He was also bound to guarantee to him what is now termed quiet enjoyment, and to reimburse him those necessary expenses, by means of which the value of the thing rented had been augmented. The contract was terminated by the expiration of the time agreed upon; by the destruction of the thing itself; by the decision of a judge, where there was a misuse of the thing or the non-payment of the rent agreed upon during two years; by the locator failing to secure for the lessee the quiet enjoyment agreed upon; by necessity compelling the locator to retake the thing; and by the agreement of the parties themselves. Death however did not always end this contract. Emphyteusis was terminated by the destruction of the thing; by the death of the emphyteutor without a legitimate or testamentary heir, or some other representative; by the non-payment of the *canon* or rent during three years; by the remuneration of the emphyteutor; by prescription, when a third person obtained the possession (*prescriptio longi temporis*). “*Extinguitur emphyteusis variis modis, puta, lapso tempore, ad quid concessa est; vel deficiente familia aut gradu, cui et ejus contemplatione constituta fuerat: ad eo ut nec post finitum tempus emphyteuta ipse, nec proximiores ultima possessoris agnati, qui vi primæ concessionis haud admittendi erant, cogere dominum invitum possint, ut is emphyteusin apertam, et ad se reversam, rursus iis sub ejusdem canonis lege concedat, et aliis idem forte offerentibus anteponat.*” Voet ad Pandectas, lib. vi. tit. 3. n. 14. Domenget pp. 394, 395. The maxim, “*Kauf bricht Miethe*”—“Sale destroys the lease”—is not true as between the *lessor* and the *lessee*; the true meaning of the maxim being that the purchaser had no need to trouble himself on account of the lessee. There arose out of *locatio conductio* two actions—the “*actio locati conducti directa*” and “*contraria*.” There was a peculiar application of the “*actio locati conducti*” in the case of a thing thrown overboard at sea. When on account of the peril of shipwreck, a part of the freight was cast overboard, and in consequence of the sacrifice, another part of

the freight was saved, the owner of the lost property had the "actio locati" against the captain, and the latter had the "actio conducti" against the owners of the property saved, for the division of the loss. Mochler's Pandect. pp. 135—138.

DE SOCIETATE.

148. Societatem coire solemus aut totorum bonorum, aut unius alicujus negotii, veluti mancipiorum emendorum aut vendendorum.

PARTNERSHIP.

148. A partnership is entered into usually either for the entire property (*totorum bonorum*), or for some particular business, as for example, for the purchase or sale of slaves.

JUST. iii. 25. pr.

149. Magna autem quæstio fuit, an ita coiri possit societas, ut quis majorem partem lucretur, minorem damni præstet. Quod Quintus Mucius etiam contra naturam societatis esse censuit; sed Servius Sulpicius, cujus prævaluit sententia, adeo ita coiri posse societatem existimavit, ut dixerit illo quoque modo coiri posse, ut quis nihil omnino damni præstet, sed lucri partem capiat, si modo opera ejus tam pretiosa videatur, ut æquum sit eum cum hac pactione in societatem admitti. Nam et ita posse coire societatem constat, ut unus pecuniam conferat, alter non conferat et tamen lucrum inter eos commune sit; sæpe enim opera alicujus pro pecunia valet. (d)

149. But it was a great question whether a partnership could be so entered into, that one of the partners should have the greater part of the gain, and only a smaller part of the loss. Quintus Mucius thought that this was entirely against the nature of partnership; but Servius Sulpicius, whose opinion has prevailed, thought that a partnership could be thus entered into; for he has said that a partnership could be also constituted in this manner, that one should not suffer any loss at all, but should take part of the profit, provided his service should appear to be so valuable that it would be equitable to admit him into the partnership upon these terms. Because it is manifest that a partnership may be thus constituted that one partner shall contribute the money, the other nothing at all, and still the profit be common to both, for it often happens that the service of one avails as an equivalent for the money of the other.

JUST. iii. 25. 2.

(d) Gaius only calls attention to two kinds of societies: 1st. A *societas totorum bonorum*, or of the whole property, comprehending not only the present property of the parties

but also their future acquisitions, from whatever source they might be derived. 2nd. A *societas* entered into for a special purpose, as for the sale of slaves. Paulus says, "*Societas coiri potest vel in perpetuum, id est, dum vivunt vel ad tempus, vel ex tempore, vel sub conditione. In societate omnium bonorum omnes res, quæ coeuntium sunt, continuo communicantur.*" l. 1. pro. soc. (17. 2.)

In Roman law, however, there were recognised three other kinds of *societas*. 1st. A partnership of all gains, having for its object the benefit of all the property which might accrue to the parties associated, except that which came to them by succession or gift: such at least was deemed to be the agreement between the parties, when without any special agreement, they had entered into a partnership of this nature. Thus Paulus says: "*Duo conliberti societatem coierunt lucri, quæstus, compendii, postea unus ex his a patrono heres institutus est, alteri legatum datum est; neutrum horum in medium referre debere respondit.*" ll. 7. 71. s. 1. tit. cit. (17. 2.) When, however, the partnership was "*specialiter omnium bonorum,*" Paulus says "*Quum specialiter omnium bonorum societas coita est, tunc et hereditas et legatum et quod donatum est, aut quaqua ratione acquisitionum, commune acquiretur.*" ll. 3. s. 2. 52. s. 6. et 63. pr. Dig. tit. cit. 17. 2. 2nd. The *societas unius rei*, having for its object several distinct transactions, as, for example, the sale or purchase of a cargo. 3rd. The *societas vectigalis*, a partnership for the farming of the public revenues. This *societas* was governed by its own particular rules.

When the *socii* had not fixed the shares of each in the partnership, neither in respect to profit nor loss, the shares were understood to be equal. If the shares had been determined, effect was given to the agreement although the portion of benefit agreed upon for one of the *socii*, were not in proportion to the burden of loss which he might be called to sustain; and even though it had been agreed, that one partner should take a share in the profits and that he should not be liable for any part of the loss.

But a *leonina societas*, in which one partner was entirely excluded from any participation in the profits, and which gave to the other what the jurists call the lion's share, that is, all the profit, was utterly invalid. ll. 29. ss. 1, 2, 30, tit. cit. 17. 2. Instit. s. 2. Dig. soc. 3. 25.

150. Et illud certum est, si de partibus lucri et damni nihil inter eos convenerit, tamen æquis ex partibus commodum et incommodum inter eos commune esse. Sed si in altero partes expressæ fuerint velut in lucro, in altero vero omissæ, in eo quoque quod omissum est similes partes erunt.

150. And this is certain that if the contracting parties have determined nothing between themselves, with respect to the portions of profit and loss, still advantage and burden in equal parts will be common between them. But if on the one side, for example, as in that of gain, the shares are expressed, but those of the other are omitted, the division of that which is omitted shall be the same as of that which is expressed.

JUST. iii. 25. 3.

151. Manet autem societas eousque, donec in eodem sensu perseverant; at cum aliquis renuntiaverit societati, societas solvitur. Sed plane si quis in hoc renuntiaverit societati, ut obveniens aliquod lucrum solus, habeat, veluti si mihi totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renuntiaverit societati, ut hereditatem solus lucrifaciat, cogetur hoc lucrum communicare. Si quid vero illud lucri fecerit quod non captaverit, ad ipsum solum pertinet. Mihi vero, quidquid omnino post renuntiatam societatem acquiritur, soli conceditur.

151. Now a partnership continues so long as the contracting parties wish to remain associated; for as soon as any one of the parties renounce, the partnership is dissolved. But if one of the partners has retired from the partnership, manifestly that he may enjoy alone a certain accruing gain, as, for example, if my partner having his entire property in the concern, upon being left heir by some one, shall renounce partnership in order that he alone may make profit out of the inheritance, he will be compelled to bring his gain into the joint property. If however, on the other hand, he has realized anything which he had not in view when he resigned his partnership, it belongs to himself alone; whatever is acquired after his renunciation of the partnership is acquired by me alone.

JUST. iii. 25. 4.

152. Solvitur adhuc societas etiam morte socii: quia qui societatem contrahit certam personam sibi eligit.

152. Moreover partnership is also dissolved by the death of a partner; because he who contracts a partnership chooses to himself a particular person.

JUST. III. 25. 5.

153. Dicitur et capitis diminutione solvi societatem, quia civili ratione capitis diminutio morti *equiparari* dicitur: sed si adhuc consentiant in societatem, nova videtur incipere societas. (e)

153. Partnership is also said to be terminated by *capitis diminutio*, because according to the principles of the civil law (*civili ratione*), *capitis diminutio* is said to be equivalent to death; but if the partners consent to remain such, a new partnership appears to commence.

JUST. III. 25. 6.

(e) The death of one or of both the partners had the effect of dissolving the partnership; Justinian says that the death of one partner, even though there might be several, had also this effect, unless on the formation of the partnership it had been otherwise agreed: "Nisi in coeunda societate aliter convenierit." Instit. s. 5. soc. (3 25). It is however now held that although it may be agreed that the heir of the deceased partner shall come into the business, or the surviving partner carry it on alone, it is really a new partnership that is constituted. The heirs of the deceased partner were entitled to demand the debts due to their testator, and were also bound to pay all for which he was liable up to the time of his death. For this purpose the *actio pro socio* could be employed. Transactions not completed at the time of the death of the testator were to be carried on by his heirs.

154. Item si cujus ex sociis bona publice aut privatim venierint, solvitur societas. Sed hoc quoque casu societas de qua loquimur nova consensu contrahitur nudo; juris enim gentium obligationes contrahere omnes homines naturali ratione possunt.

154. Again the partnership is dissolved, if the property of one of the partners is sold publicly or privately. But also in this case the partnership of which we speak may be contracted anew by mere consent; for all men can according to the principle of the *jus gentium* (*naturali ratione*) contract obligations.

JUST. III. 25. 7.

DE MANDATO.

155. *Mandatum* consistit sive nostra gratia mandemus sive aliena, id est sive ut mea negotia geras, sive ut alterius mandem tibi, erit inter nos obligatio, et invicem alter alteri tenebimur, ideoque *judicium* erit in id quod paret te mihi bona fide prestare oportere. (f)

OF MANDATE.

155. A mandate exists if we commission a person to do anything, either for ourselves or for some one else; that is, if I commission you to attend to my business, or to that of another person; in which case an obligation arises between us, and we shall be bound reciprocally the one to the other, and thus an action will lie for that which it appears you ought in good faith to give to me.

JUST. iii. 26. pr.

(f) *Mandatum* also belongs to the class of contracts called *consensual*. Paulus says the essence of *mandatum* consisted in this, that one person commissions another to do something for him without reward; for if a recompense (*merces*) be given, the contractual obligation would not be a *mandatum*, but a *locatio conductio*. “*Obligatio mandati consensui contrahentium consistit: mandatum nisi gratuitum nullum est; nam originem ex officio atque amicitia trahit; contrarium ergo est officio merces, interveniente enim pecunia res ad locationem et conductionem totius respicit.*” l. 1. pr. s. 4. Dig. mand. vel contra. (17. 1.)

A *mandatum* may be either general (*omnium bonorum*) or special (*unius rei*). “*Procurator est qui aliena negotia mandatu domini administrat. Procurator autem vel omnium rerum, vel unius rei esse potest, constitutus vel eorum, vel per nuntium, vel per epistolam, etc.*” l. 1. pr. s. 1. de proc. et defens. (3. 3.); Gai. ii. 162.; Instit. s. 13. de mand. (3. 26.); l. 1. s. 1. tit. cit. (17. 1.) There were, however, certain *mandata*, in which a recompense or promise was made to the *mandatarius*, under the name of an *honorarium*. Such was the case when a man exercised one of what was denominated the liberal professions; as philosopher, rhetorician, physician, advocate, geometrician, &c. In these cases in which the mandans made a promise of recompense to the *mandatarius*, the reward might be claimed by

the latter, not however by the *actio mandati*, but by a process denominated *extraordinem*, before the Prætor or the Preses of a province. Domenget says that the French school of economists have endeavoured to hold up to ridicule, the affectation of exercising a liberal profession, and of applying the term *honorarium* to the recompense which the professional man receives. This ridicule, he maintains, has tended to obliterate a real distinction which exists between the labourer or handicraftsman, and the physician who by his skill saves a man's life; or the advocate who protects his honour, or his fortune; or the teacher who moulds his intellect. 1. 7. Dig. tit. cit. (17. 1.) Domenget in loco. Ulpianus says, "Præses provinciæ de mercedibus jus dicere solet, sed præceptoribus tantum studiorum liberalium. Liberalia autem studia accipimus, quæ Græci *ἐλευθερία* (liberalia) appellant; rhetores continebuntur, grammatici, geometræ. Medicorum quoque eadem causa est, quæ professorum, nisi quod justior, quum hi salutis hominum, illi studiorum curam agant; et ideo his quoque extra ordinem jus dici debet." 1. 1. de extra. cognit. (50. 13.)

156. Nam si tua gratia tibi mandem, supervacuum est mandatum; quod enim tu tua gratia facturum sis, id ex tua sententia, non ex meo mandatu facere videberis: itaque si otiosam pecuniam domi te habere mihi dixeris, et ego te hortatus fuerim, ut eam fenerares, quamvis eam ei mutuam dederis a quo servare non potueris, non tamen habebis mecum mandati actionem. Item et si hortatus sim, ut rem aliquam emerem, quamvis non expedierit tibi eam emisse, non tamen mandati tibi tenebor. Et adeo hæc ita sunt, ut quaeratur an mandati teneatur qui mandavit tibi, ut Titio pecuniam fenerares (g) . . quia non aliter Titio credidisses, quam si tibi mandatum esset.

156. For if I commission you to do anything for your own advantage, the mandate is superfluous; because what you may do for your own benefit, that you seem to do in consequence of your own opinion, not on account of my mandate; therefore if you have said to me that you have spare money by you (*domi*), and I have advised you to lend it at interest; yet you will not have against me the *actio mandati*, even if you have given the money as a *mutuum* to any one, from whom you could not afterwards recover it. Again, if I have also advised you to purchase anything, although it may not be advantageous to you to have bought the thing, still I shall not be liable to you on account of the mandate. This indeed is a matter of such im-

portance, that it is a question whether he who has commissioned you to lend money on interest to Titius, is liable on account of the mandate
 . . because you would not have lent to Titius, except the mandate had been given you.

JUST. iii. 26. 6.

(g) There are two lines and a half here lost which Huschke has proposed to fill up as follows: "Fenerares, sed verior est Sabini sententia, si non generaliter ut pecuniam fenerares mandatum sit, sed fenerare Titio jussus sis, esse mandati actionem existimantis, quia non aliter." See l. 6. secs. 4, 5. l. 32. Dig. mandati. (17. 1).

157. Illud constat, si faciendum quid mandetur quod contra bonos mores est, non contrahi obligationem, velut si tibi mandem, ut Titio furtum aut injuriam facias.

157. It is manifest that if anything is ordered to be done which is opposed to morality (*contra bonos mores*), no obligation is contracted, as for example, if I direct you to steal from Titius, or to do him an injury.

JUST. iii. 26. 7.

158. Item si quid post mortem meam faciendum mihi mandetur, inutile mandatum est, quia generaliter placuit ab heredis persona obligationem incipere non posse.

158. Again if any one commissions me to do something after my death, the mandate is invalid, because it is an established doctrine that an obligation cannot commence in the person of the heir.

159. Sed recte quoque consummatum mandatum, si dum adhuc integra res sit revocatum fuerit, evanescit. (h)

159. But a legally constituted mandate is extinguished, if it be revoked whilst the thing is still in its original condition.

JUST. iii. 26. 9.

(h) The *mandatarius* was bound to discharge the duties involved in the *mandatum rite*, that is in due and proper form; and also personally, unless it had been understood that some other persons were to be employed for the purpose. He was also liable for *omnis culpa*. It was his duty to keep an account of all the expenses that he incurred as bailee, which

were made good to him by the *mandans*, who must also save the *mandatarius* from all liabilities and be answerable for *omnis culpa*, but not for accident, *casus*. If the *mandatarius* was not aware of the death of the *mandans*, it was regarded, so far as he was concerned, as if the *mandans* were still living. The *mandans* had for the protection of his right the “*actio mandati directa*.” The *mandatarius*, the “*actio mandati contraria*.” A *mandatum* was extinguished by the revocation of the *mandans*; by the death of either the *mandans* or the *mandatarius*, unless it had been intentionally extended to the heirs; by the renunciation of the *mandatarius*; and finally by the conclusion of the transaction which had been undertaken. If the revocation took place before anything had been done, the *mandatum* was regarded as never having existed. If it took place after the commencement of the work, whatever that might be, that which was done was binding on the *mandans*. Thus Paulus says, “*si mandassem tibi, ut fundum emeress, postea scripsissem, ne emeress, tu, antequam scias, me vetuisse, emissess, mandati tibi obligatus ero, ne damno afficiatur is, qui suscipit mandatum*.” l. 15. mand. (17. 1). The *mandatarius* was entitled to have a notice if his *mandatum* were to cease, and until he had received such notification he had a right to act. Domenget in loco. Moehler's Pand. pp. 128. 129.

160. Item si adhuc integro mandato mors alterutrius alienjus interveniat, id est vel ejus qui mandarit, vel ejus qui mandatum suscepit, solvitur mandatum. Sed utilitatis causa receptum est, ut si mortuo eo qui mihi mandaverit, ignorans eum decessisse exsecutus fuero mandatum posse me agere mandati actione: alioquin justa et probabilis ignorantia damnum mihi adferet. Et huic simile est quod plerisque placuit, si debitor meus manumisso dispensatori meo per ignorantiam solverit, liberari eum: cum alioquin stricta juris ratione non posset liberari eo quod

160. Again the mandate is dissolved, if the commission being still unexecuted, in the mean time the death happens of both, or one of the contracting parties, that is to say either of the *mandans* or of the *mandatarius*. But on the ground of utility it has been held, that if I have executed the mandate, after the death of my *mandans*, and, without knowledge of his decease I may still employ the *actio mandati*, otherwise a just and pardonable ignorance will bring damage to me. And to this is analogous, what most jurists have admitted, that my debtor,

alii solvisset quam cui solvere deberet.

having paid his debt to a dispensator in ignorance of the fact that he has been manumitted, is discharged from the debt; whilst according to strict law, he would not be released from his obligations, since he had given in payment to one person what he ought to have paid to another.

161. Cum autem is cui recte mandaverim egressus fuerit mandatum, (i) ego quidem eatenus cum eo habeo mandati actionem, quatenus mea interest implere eum mandatum, si modo implere potuerit: at ille mecum agere non potest. Itaque si mandaverim tibi, ut verbi gratia fundum mihi sestertiis c emeris, tu sestertiis c emeris, non habebis mecum mandati actionem, etiamsi tanti velis mihi dare fundum quanti emendum tibi mandassem. Idque maxime Sabino et Cassio placuit. Quodsi minoris emeris, habebis mecum scilicet actionem, quia qui mandat ut c milibus emeretur, is utique mandare intellegitur, ut minoris, si posset, emeretur.

161. But I have an *actio mandati* against him, whom I have properly commissioned, if he has overstepped my instructions, to the full extent of my legal interest in the accomplishment of the mandate, provided it has been in his power to fulfil it; but the *mandatarius* cannot sue me. Therefore if, for instance, I have empowered you to purchase an estate for me, for one hundred thousand sesterces, and you have bought it for one hundred and fifty thousand, you will not be entitled to the *actio mandati* against me, even if you were willing to let me have the land for the price which I had authorized you to give. And this is assuredly the opinion of both Sabinus and Cassius. But if you have bought it for a less sum, you will certainly be entitled to the *actio*, because it is understood that he who is commissioned to purchase for one hundred thousand, is assuredly empowered to purchase for a less amount if he be able.

JUST. iii. 26. 8.

(i) A *mandatum* is that consensual contract, in which one person, called the *mandatarius* or procurator, promises to take charge of the lawful business of another without reward for his trouble. Doménget defines “*mandatum*” as follows:—“Le mandat est un contrat par lequel une per-

sonne charge une autre personne qui accepte de faire gratuitement quelque chose pour elle." In modern civil law it is held that a mandate may be undertaken even though a certain recompense be assured. See Glück's Com. xv. p. 260 et seq. A mandate might be general (*omnium bonorum*) or special (*unius rei*). In regard to the person, it was said to be *simplex* if it were for the advantage of the "mandans," or *qualificatum* if it were for the benefit of a third party. The *mandatarius* was bound to discharge the commission which he had undertaken *rite*, and in his own person, unless it were understood that he might employ another. He was also liable for *omnis culpa*; but was allowed his costs and interests on the outlay he had incurred. The "mandans" had the "*actio mandati directa*," the "*mandatarius*" the "*actio mandati contraria*." The contract was extinguished by death or revocation. By the death of either the "mandans" or the "*mandatarius*," unless it was understood to extend to the heir; by the revocation of either the "mandans," or the "*mandatarius*." The latter, however, could not relinquish his commission at an unseasonable time without rendering himself liable for the damage, and he continued as "*mandatarius*" until the moment his revocation was known to the mandans. Moehler, Pandect., pp. 127. 129.

162. In summa sciendum est, *quod* *faciendum* aliquid gratis dederim, quo nomine si mercedem statuissem, *locatio* et *conductio* contraheretur, *mandati* esse *actionem*, veluti si fulloni *polienda* curandave *vestimenta* aut *sarcinatori* *sarcienda* dederim.

162. In general it is to be observed that there is an *actio mandati*, when I have given to anyone something to do, without recompense (*gratis*): if for such service a price had been fixed, a letting and hiring (*locatio et conductio*) would be contracted; for example, if I have given garments to a fuller to be calendered, or to a tailor to be repaired.

JUST. iii. 26. 13.

PER QUAS PERSONAS NOBIS OBLIGATIO ADQUIRITUR.

163. Expositis generibus obligationum quæ ex contractu nascuntur, admonendi sumus *adquiri nobis non*

BY WHAT PERSONS AN OBLIGATION IS ACQUIRED FOR US.

163. After having spoken of the different kinds of obligations arising out of a contract (*ex contractu*), we

solum per nosmet ipsos, sed etiam per eas personas quæ in nostra potestate manu mancipiove sunt.

ought to mention that we acquire not only by ourselves, but also by those who are under our *potestas*, our *manus*, or *mancipium*.

JUST. iii. 28. pr.

164. Per liberos quoque homines et alienos servos quos bona fide posidemus adquiritur nobis: sed tantum ex duabus causis, id est si quid ex operis suis vel ex re nostra adquiritur.

164. We acquire also by free men, and by slaves owned by others, whom we possess in good faith (*bona fide*): but only on two grounds, namely, if they acquire something in consequence of their industry (*ex operis*), or by means of our property (*ex re nostra*).

JUST. iii. 28. 1.

165. Per eum quoque servum in quo usumfructum habemus similiter ex duabus istis causis nobis adquiritur.

165. Also by means of that slave, of whom we have the usufruct, we acquire in like manner from the same two causes.

JUST. iii. 28. 2.

166. Sed qui nudum jus Quiritium (*j*) in servo habet, licet dominus sit, minus tamen juris in ea re habere intelligitur quam usufructuarius et bonæ fidei possessor. Nam placet ex nulla causa ei adquiri posse, adeo ut etsi nominatim ei dari stipulatus fuerit servus, mancipiove nomine ejus acceperit, quidam existiment nihil ei adquiri.

166. But he who has the mere Quiritarian right in a slave (*nudum jus Quiritium*), although he may be the owner, is considered as having still less right in this respect than the usufructuary and the *bona fide* possessor. For it has been held that he cannot acquire in any case by his slave; so that even if the slave has stipulated expressly that something shall be given to his master, or if he has received anything by mancipation in his master's name, some are of opinion that the master will take nothing.

(*j*) The "jus Quiritium" was a more limited right than the "jus naturale;" hence, any one might have the latter without being "dominus ex jure Quiritium." Again, in

some respects the “*jus naturale*” is a more limited right than the “*jus Quiritium*,” and a person might have lost the former right, and yet still be entitled to the latter; in which case he was said to have a “*nudum jus Quiritium*.” The older *jus* was without doubt the “*jus Quiritium*,” the “*jus naturale*” arising subsequently coalesced with the “*jus Quiritium*,” thus securing as it were its correction and its completion. Thus, if one person held the property *in bonis*, whilst another was Quiritarian owner, the latter was said to have the “*nudum jus Quiritium*.” Justinian abolished this distinction. *Cod. de nudo jure Quiritium tollendo* (7. 25). See also notes to i. 24. ii. 40. and Puchta's *Instit.* ii. 236. b. cc. mm.

167. *Communem servum pro dominica parte dominis adquirere certum est, excepto eo, quod uni nominatim stipulando aut mancipio accipiendo illi soli acquirit, veluti cum ita stipuletur: TITIO DOMINO MEO DARISPONDES? aut cum ita mancipio accipiat: HANC REM EX JURE QUIRITIIUM LUCHI TITII DOMINI MEI ESSE AIO, EAQUE EI EMPTA ESIO HOC ERRE AENEAEQUE LIBRA.* (k)

167. It is certain that a slave owned by several masters acquires for each, according to the share which each one has in him, except in the case where he stipulates, or receives in mancipium expressly for one owner only, in which case he acquires for this one alone, for example, if he thus stipulates: “Do you promise to give to my master Titius?” or if he thus receives in mancipium: “I affirm that the thing belongs to my master Lucius Titius by Quiritarian ownership, and that it has been purchased for him by means of this copper, and this copper-balance.”

JUST. iii. 28. 8.

(k) For further explanations on ss. 163—167. see the remarks made on ii. 66. et seq., and on i. ss. 48, 52, 55, 107—120.

167a. *Illud quæritur num quod unius domini nomen adjectum efficit, idem faciat unius ex dominis jussum intercedens. Nostri præcep-*

167a. It is a disputed question whether an order given by one of two masters, has the same effect as a stipulation made in the name of

tores perinde ei qui jusserit soli acquiri existimant, atque si nominationem ei soli stipulatus esset servus, mancipiove accepisset. Diversæ scholæ auctores proinde utrisque adquiri putant, ac si nullius jussum intervenisset.

that master. The doctors of our school are of opinion that the acquisition is made to him alone, who has given the order, just as if the slave had expressly stipulated for him, or had received in mancipium for him. But the doctors of the opposite school hold that the property is acquired for both, just as if no order had intervened.

168. Tollitur autem obligatio præcipue solutione ejus quod debeatur. Unde quæritur, si quis consentiente creditore aliud pro alio solverit, utrum ipso jure liberetur, quod nostris præceptoribus placet: an ipso jure maneat obligatus, sed adversus petentem exceptione doli mali defendi debeat, quod diversæ scholæ auctoribus visum est. (l)

168. An obligation is extinguished in the first place, by the payment of that which is due. Hence it is asked, whether supposing one person has paid a debt for another, with the consent of his creditor, the debtor will be discharged by the mere operation of law (*ipso jure*); the teachers of our school affirm that he is freed: or again supposing him to continue bound *ipso jure*, ought he to defend himself against any one claiming by means of the *exceptio doli mali*, as is the opinion of the opposite school.

JUST. iii. 29. pr.

(l) There are several modes by which an obligation may be extinguished *ex professo*.

1. By *solutio*, or payment, that is, by the fulfilment of the obligation on the part of the debtor, by giving him the promised satisfaction. Thus, Ulpianus says, "Solvere dicimus eum, qui fecit, quod facere promisit." l. 176. de verb. sig. (50. 16.) Payment might be made not only to the creditor himself, but to his "mandatarius," or to the "solutionis causa adjectus," or to the "creditor creditoris;" provided however, that the payment was made with the intention of discharging the obligation, by the instructions and for the benefit of the creditor. An *adjectus* differed from a *mandatarius*. He had neither rights arising out of the obligation, nor any right to the *actio*, nor had he power to dispense with

the obligation : but the debtor was justified in paying him, and the creditor had no power to prevent the payment. In this last respect consisted the difference between the *adjectus* and the *mandatarius*. In order to entitle a third person to demand compensation, the cession of the debt by the creditor before the commencement of the action was necessary ; or there must be the requisites for the “*actio mandati*,” or for the “*actio negotiorum gestorum*.” Legal capacity was required also, both on the part of the creditor and of the debtor. Thus, payment could only be made to a pupil with the consent of his tutor. In like manner, the consent of the tutor was necessary, in order to the pupil’s making payment. If, however, the latter had made payment in the same manner as that required from the tutor, it was held to be a legal solution. A debtor who affirmed that he had made payment, must prove it by adequate proof, as by witnesses, by oath, and especially by a receipt, or as it was termed *apocha*. “*Apocha non alias quam si pecunia soluta sit.*” l. 19. s. 1. Dig. de acceptil. (46.4.) The receipt of a private person did not mature so as to be evidence until after thirty days. Till that period, it might be rebutted by a plea, the “*exceptio non numeratæ pecuniæ*.”

2. By *deposition* and *dereliction*. If a debtor were prevented from making payment to his creditor, because the latter would not or could not receive it, through *mora accipienda* or absence ; the debtor might deposit his debt at the tribunal, or even abandon it altogether, if deposition were impossible. Thus, if wine were sold without the cask, it might actually be poured out on the ground. Ulpianus says, “*Licet autem venditori vel effundere vino, si diem ad metiendum præstituit, nec intra diem admensum est ; effundere autem non statim poterit, priusquam testando denunciaret emptori ut aut tollat vinum aut sciat futurum, ut vinum effunderetur ; si tamen quum posset effundere, non effudit, laudandus est potius ; etc.*” l. 1. s. 3. de per. et comm. rei vend. (18.6.)

3. *Novatio*, which is the solution of an obligation, by the

creation of another, in its place. Novation is said to be *voluntaria*, when it proceeds from an act of the will, and *necessaria*, when it results immediately from some act or process not in the immediate will of the parties, as, for example, the *litis contestatio*, or the *judgment* in an action. A novation may also be either a “*novatio simplex*,” or “*qualificata*,” according as the object or the subject is changed. When the subject is changed, there is either a *promissio* if the debtor is changed, or *delegatio*, if the creditor is changed. The requisites for a novation are, 1. Two legally existing obligations; 2. A legal subject—*cui recte solvitur*; 3. The *animus novandi*, for, in the absence of this, the posterior obligation is either a mere supplementary agreement or an independent obligation.

4. *By confusion*. This arose whenever the claim and the liability united in one and the same individual. When this took place so that the creditor and the principal debtor became one and the same person, the entire obligation was extinguished. Again, if the principal debtor, and the accessory one happened to coalesce in the same person, or if the latter became identical with the creditor, then the accessory obligations were extinguished. ll. 93, 95, s. 3. 38. s. 5. de solut. (46. 3.)

5. *Remission*. A creditor might either remit his claim in part, or in whole. *Acceptilatio* was a solemn form of remission. “Item per acceptilationem tollitur obligatio. Est autem acceptilatio imaginaria solutio. Quod enim ex verborum obligatione Titio debetur, id si velit Titius remittere, poterit sic fieri, ut patiatur hæc verba debitorum dicere: ‘Quod ego tibi promisi habesne acceptum?’ et Titius respondeat; ‘Habeo.’” Instit. s. I. quib. mod. oblig. toll. (3.29.) An informal mode of remission was the “*pactum de non petendo*.” The difference between the two modes of remission was as follows: *Acceptilatio* operated *ipso jure* and actually destroyed the obligation. The “*pactum de non petendo*” wrought “*ope exceptionis*,” and freed the debtor. If the

pactum were concluded *in rem*, it released both the heir and his securities; if *in personam*, it only operated as a personal release.

6. By *contrarius consensus* or *mutuus dissensus*. This mode of dissolving an obligation can only take place when the obligation has arisen by consent, and so long as it continues dependent on the consent of the parties. Such an agreement between the parties operates "*ipso jure*," and dissolves the obligation.

7. By the destruction of the thing due; or the impossibility of fulfilling the obligation.

8. By *res judicata*. An absolute judicial sentence destroys the obligation.

9. By *compensation*. "*Compensatio est debiti et crediti inter se contributio*." l. 1. Dig. de compens. (16. 2.) This was a fictitious mutual payment. Compensation did not arise "*ipso jure*," but required a distinct act, as well as the accord of the will of the parties. There must be two valid claims, and the objects must be of such a nature as to render liquidation possible. Hence the maxim: "*Liquidi cum illiquido nulla compensatio*."

10. By *præscriptio*. An obligation might be terminated by prescription for two reasons; that there might be legal security, and as a punishment for want of vigilance. "*Ut . . . sit aliqua inter desides et vigilantes differentia . . . quum contra desides homines et sui juris contemptoris odiosæ exceptiones oppositæ sunt*." ll. 2. 3. Cod. de annali exc. (7. 40). The time for *præscriptio* was reckoned *civiliter*, so that the very last moment of time permitted by law must have expired. Whether a natural obligation remained has been a matter of much dispute. Till the time of Theodosius II, the rule was that all civil actions were perpetual. This emperor limited them to thirty years. See Boecking's Instit. pp. 63, 64. Arndt's Pand. 417.

11. By *oath*. The parties might agree that an obligation which was in dispute, should be decided by the solemn oath of one of the litigants.

12. By *transactio*. Ulpianus says, “Qui transigit, quasi de re dubia et lite incerta neque finita transigit, qui vero paciscitur, donationis causa rem certam et indubitatem liberalitate remittit.” l. 1. de trans. (2. 15.) The transaction was the settlement of a legal dispute between parties by mutual remission of claims. “*Transactio in via*” was the settlement of the dispute on the way to the court. This mode of settlement of rival claims, may serve to explain the passage in Matt. 5. 25. Gai. iv. 25. 46. Cic. 2. The *Transactio*, the Oath, *Prescriptio*, *Compensatio*, *Pactum de non petendo*, and the Remission of an obligation by a creditor, were modes of dissolving an obligation, recognised only by the prætorian law; the other modes had the sanction of the “*jus civile*.” Moehler Pandect. pp. 116—123. Domenget in loco. Hermann’s Handlex. sub. vocib. Scheurl’s Instit. ss. 127—130. and especially Von Vangerow, Pandecten, Drittes Capitel. vol. iii. pp. 370—397. Alford’s Greek Test. on Matt. 5. 25.

169. Item per acceptilationem tollitur obligatio. Acceptilatio autem est veluti imaginaria solutio. Quod enim ex verborum obligatione tibi debeam, id si velis mihi remittere, poterit sic fieri, ut patiaris hæc verba me dicere: QUOD EGO TIBI PROMISI, HABESNE ACCEPTUM? et tu respondeas: HABEO.

169. Again, an obligation is dissolved by *acceptilatio*. Now an *acceptilatio* is a kind of fictitious solution, for if you are willing to discharge me from that which I am indebted to you on the ground of a verbal obligation, it may be accomplished by your permitting me to speak the following words; “Have you received that which I have promised to you?” and you respond, “I have.”

JUR. iii. 29. 1.

170. Quo genere, ut diximus, tantum hæ obligationes solvuntur quæ ex verbis consistunt, non etiam ceteræ: consentaneum enim visum est verbis factam obligationem posse aliis verbis dissolvi. Sed et id quod ex alia causa debeatur potest in sti-

170. In which manner, as we have already said, only verbal obligations, and none others, can be dissolved: for it appeared agreeable to reason, that an obligation entered into verbally, should again be dissolved by means of other words. But

pulationem deduci et per acceptilationem imaginaria solutione *dissolvi*.
(*m*)

also that which may be done on other grounds, may be brought into the form of a stipulation, and then be extinguished by *acceptilatio*, which is a fictitious payment.

JUST. III. 29. 1.

(*m*) In the *acceptilatio*, as we see from the previous section, the reply must be conformable to the question asked. The *acceptilatio* was only applicable to verbal obligations, and as a mode for the extinguishing of an obligation it was retained in the later law. An obligation, however of a different kind might be changed into a *verborum obligatio*, in order to render *acceptilatio* as a mode of extinction applicable, and might then be dissolved. Whether an *acceptilatio* for a part of the debt were possible, was a matter of much doubt. Justinian decided that it was allowable; and Julianus says “Qui hominem aut decem stipulatus est, si quinque accepto fecerit, partem stipulationis peremit, et petere quinque, aut partem hominis potest.” 1. 17. Dig. de accep. (46.4). The device for extinguishing any kind of obligation by means of a stipulatio followed by an acceptilatio was invented by Aquilius Gallus, hence it was called the Aquilian stipulation. 1. 18, s. 1. Dig. tit. cit. (47.4). s. 3. Instit quib. mod. toll. (3.29). Puchta’s Instit. vol. iii. p. 155.

171. Tamen mulier sine tutoris auctore acceptum facere non potest cum alioquin solvi ei sine tutoris auctoritate possit.

171. Still a woman without the authority (*auctoritas*) of her tutor, cannot release her debtor by *acceptilatio* (*acceptum facere*): although payment may be made to her without the authority of her tutor.

172. Item quod debetur pro parte recte solvi intellegitur: an autem in partem acceptum fieri possit quosium est.

172. Again the part payment of a debt may be legally made, but whether there can be the *acceptilatio* of a part, is a point that is questioned.

173. *Est etiam alia species imaginariæ solutionis per æs et libram. Quod et ipsum genus certis in causis receptum est, veluti si quid eo nomine debeatur quod per æs et libram gestum est, sive quid ex iudicati causa debebitur.*

174. *Adhibentur autem non minus quam quinque testes et libripens. Deinde is qui liberatur ita oportet loquatur: QUOD EGO TIBI TOT MILIBUS EO NOMINE (n) . . . SOLVO LIBERO QUE HOC ÆRE ÆNEAQUE LIBRA. HANC TIBI LIBRAM PRIMAM POSTREMAM . . DE LEGE JURE OBLIGATUR. Deinde asse percussit libram, eumque dat ei a quo liberatur, veluti solvendi causa.*

(n) After “eo nomine” Huschke formerly proposed to read “jure nexi sum damnas,” and Lachmann gave the conjectural reading, “vel eo iudicio damnatus sum, eos nummos.” Huschke now reads “velut secundum mancipium sum damnas.” And after the words “primam postremam,” he reads, “que secundum legem publicam,” which conjecture has been received by Boecking.

175. *Similiter legatarius heredem eodem modo liberat de legato quod per damnationem relictum est, ut tamen scilicet, sicut iudicatus sententia se damnatum esse significat, ita heres defuncti iudicio se damnatum esse dicat. De eo tamen tantum potest hoc modo liberari quod pondere numero constet; et ita, si certum sit quidam et de eo quod mensura*

173. There is still another kind of fictitious payment, that by the copper and the balance (*per æs et libram*): which mode of solution has come into use in certain cases; for instance, when anything is due by virtue of a mancipation, or if something can be claimed on the ground of a judgment (*ex iudicati causa*).

174. But there must be present no less than five witnesses, and the balance-holder. Thereupon he who is freed must thus speak: “Because I am indebted to you in so many thousand . . . I pay and I free myself by means of the copper and copper-balance. This balance I present to thee for the last time which I presented at first . . . is bound in accordance with a public lex.” Then he strikes the balance with an As, which he gives to the person by whom he is freed, as if in payment of his debt.

175. Likewise the legatee discharges the heir in the same manner from a legacy, which has been left him *per damnationem*; so that just as he who is brought before the judges ascertains that he is condemned by their sentence, the heir declares that he is as one condemned (*damnatus*) by the *iudicium* of the *defunctus*. Still the

constat *intellegendum* existimant.

heir can only be absolved in this manner, when the legacy consists of something which may be weighed or counted, (*quod pondere, numero constat*), and also when the thing consists of a definite quantity (*si certum sit*), but some, indeed, are of opinion that we are also to understand it as being applicable to those things which may be measured (*quod mensura constat*).

(o) The lacuna in the text has been supplied from Rudorff and Lachmann. Huschke, in his Gaius, reads: "Scilicet, ubi qua de causa alteri damnatum se esse significantur, heres ei se testamento dare damnatum esse dicat;" a reading which varies somewhat from that which he gives in his work on Nexum, 236.

176. Præterea novatione (*p*) tollitur obligatio, veluti si quod tu mihi debeas a Titio dari stipulatus sim. Nam eti intervenitu novæ personæ nova nascitur obligatio, et prima tollitur translata in posteriorem, adeo ut interdum, licet posterior stipulatio inutilis sit, tamen prima novationis jure tollatur. Veluti si quod mihi debes a Titio post mortem ejus vel a muliere pupillove sine tutoris auctoritate stipulatus fuero. Quo casu rem amitto: nam et prior debitor liberatur et posterior obligatio nulla est. Non idem juris est, si a servo stipulatus fuero: nam tunc proinde adhuc obligatus tenetur, ac si postea a nullo stipulatus fuisssem.

176. Moreover, an obligation is extinguished by a *novatio*; for example, if I have stipulated, that what you are indebted to me shall be paid by Titius. For by the intervention of a new person there arises a new obligation; and the first is extinguished as being transferred to a more recent obligation; so that even sometimes, when the subsequent stipulation is invalid the first is nevertheless extinguished by the effect of the *novatio* (*jure novationis*). For example, if I have stipulated to receive what you are indebted to me, from Titius after his death, or from a woman or pupil without the authority (*auctoritas*) of the tutor. In these cases I lose the thing owing to me, for the first debtor is freed from his liabilities, and the subsequent obligation is void (*nulla est*). The same rule of law does not apply if I have stipulated from a slave; for in

this case the original debtor remains bound just as if a second stipulation had not been made.

JUST. iii. 29. 3.

(p) Novation was the translation of an existing obligation into a new one, which took its place. There could be no *novatio* unless there were an existing obligation, which might be either a natural or a civil one. Ulpianus defines *novatio* as follows: “*Novatio est prioris debiti in aliam obligationem, vel civilem vel naturalem, transfusio atque translatio, hoc est, quum est præcedenti causa ita nova constituitur, ut prior perimatur; novatio enim a novo nomen accepit, et a nova obligatione. Illud non interest, qualis processit obligatio, utrum naturalis, an civilis, an honoraria, et utrum verbis, an re, an consensu; qualiscunque igitur obligatio sit, quæ præcessit novari verbis potest, dummodo sequens obligatio aut civiliter teneat, aut naturaliter, utputa si pupillus sine tutoris auctoritæ promiserit. l. 1. Dig. de novat. et aleo. (46.2).*”

The *novatio* was said to be *necessaria* when it resulted from the *litis-contestatio* or in consequence of the judgment given by a *judex*. It was called *voluntaria* when it resulted from intentional legal transactions between the parties. Puchta Instit. vol. 3. pp. 139, 140.

177. Sed si eadem persona sit a qua postea stipuler, ita demum *novatio* fit, si quid in posteriore stipulatione novi sit, forte si conditio vel sponsor aut dies adiciatur aut *detrahatur*.

177. But if the person from whom I make the more recent stipulation is the same, then only a *novatio* arises when something new is contained in the more recent stipulation, if, perchance, a condition, or a sponsor, or a term (*dies*) is added or taken away.

178. Sed quod de sponsore dixi, non constat. Nam diversæ *scholæ* auctoribus placuit nihil ad *novatio-*

178. But what I have said regarding the sponsor is not well established. For the founders of the opposite

nem proficere sponsoris adjectionem aut detractioem.

179. Quod autem diximus, si condicio adiciatur, novationem fieri sic intellegi oportet, ut ita dicamus factam novationem, si conditio extiterit: alioquin, si defecerit, durat prior obligatio. Sed videamus, num is qui eo nomine agat doli mali aut pacti conventi exceptione possit summoverti, et videatur inter eos id actum, ut ita ea res peteretur, si posterioris stipulationis extiterit condicio. Servius tamen Sulpicius (q) existimavit statim et pendente condicione novationem fieri, et si defecerit condicio, ex neutra causa agi posse, et eo modo rem perire. Qui consequentur et illud respondit, si quis id quod sibi Lucius Titius deberet, a servo fuerit stipulatus, novationem fieri et rem perire; quia cum servo agi non poterit. Sed in utroque casu alio jure utimur: non magis his casibus novatio fit, quam si id quod tu mihi debeas a peregrino, cum quo sponsi communio non est, SPONDES verbo stipulatus sim.

school have received that the adding or withdrawing of a sponsor accomplished nothing in regard to the *novatio*.

179. But when we have said that a novation arises if a condition is added, it must be understood that we affirm the *novatio* will only take place if the condition is accomplished; otherwise, if it shall have failed, the former obligation remains. But let us see whether he who sues in that case can be repelled by means of the *exceptio doli mali*, or *pacti conventi*, when it appears the parties have agreed among themselves that the thing shall be demanded if the condition of the subsequent stipulation is accomplished. According to the opinion of Servius Sulpicius, a *novatio* immediately arises even whilst the condition is pending; and if the condition shall have failed, no action could be maintained either upon the one ground or the other (*ex neutra causa*), and in that manner the thing is lost. From which it follows, as he says, that if anyone has stipulated from a slave for that which Lucius Titius was indebted to him, a *novatio* takes place and the thing perishes; because there can be no action against the slave. But in both cases we employ a different rule, saying that in such cases a *novatio* no more arises than if by means of the formula "Do you promise?" (*spondes*), I had stipulated with a foreigner (*peregrinus*), incapable of stipulating by the sponsio for what you are indebted to me.

(q) Servius Sulpicius, the lawyer, was born B.C. 106, and

was induced to study jurisprudence in consequence of Scævola, the pontifex, saying, "That it was disgraceful for a patrician, and a noble, and one who pleaded causes, to be ignorant of the law." He is referred to by Pomponius in his *Epitome of legal history* given in the *Digest*, sec. 1. 2. ss. 42, 43. *Dig. de orig. jur.* (1.2). We have no quotation from the writings of Servius Sulpicius himself in the *Digest*, but his opinions are often referred to by the jurists whose works are extracted in the *Pandects*. Servius Sulpicius was a scholar of Aquilius Gallus, whose formulæ are named after him, and are now known by jurists as the "*stipulatio Aquiliana*," and "*postuma Aquiliana*." See *Instit. Rom. Law*, part i. p. 97. For limitation of the "*sponsio*," see *Gai. iii. secs. 93. 94.*

180. *Tollitur adhuc obligatio litis contestatione (r), si modo legitimo iudicio fuerit actum. Nam tunc obligatio quidem principalis dissolvitur, incipit autem teneri reus litis contestatione; sed si condemnatus sit, sublata litis contestatione incipit ex causa iudicati teneri. Et hoc est quod apud veteres scriptum est, ante litem contestatam dare debitorem oportere, post litem contestatam condemnari oportere, post condemnationem iudicatum facere oportere.*

180. Further, an obligation is extinguished by the "*litis contestatio*," provided that the suit had been carried on before a "*legitimum iudicium*." For then indeed the original obligation is dissolved; the debtor however commences to be bound by virtue of the "*litis contestatio*:" but if he is condemned, the "*litis contestatio*" being thus annulled, he is held bound from that moment upon the ground of the judgment given (*ex causa iudicati*). And this is in accordance with what the ancient jurists have written; before the "*litis contestatio*" the debtor ought to pay; after the "*litis contestatio*," he ought to be condemned; after the condemnation he ought to do that which the *judex* has decreed.

(r) In ancient Rome, at the time when the mode of process known as the "*leges actiones*" prevailed, there was an important division of the process into those proceedings conducted *in jure* and those *in iudicio*. These proceedings were strictly technical and verbal, and the solemn deter-

mination of the "id de quo agitur inter partes," or as we should term it in modern phrase "the issue" was denominated the "litis contestatio." "Contestari est," says Festus, "cum uterque reus dicit: testes estote." De verb. sig. sub voce. The proceedings *in jure* were intended for the determination of the real point in dispute between the litigant parties. When these proceedings ended there was a solemn "litis contestatio" or resumé of the results of the proceedings in the presence of witnesses. It is highly probable, though the point cannot be certainly determined, that at this instant there arose a contract between the parties as the result of the previous litigant proceedings. When the process by *formula* arose, the term "litis contestatio" was still retained, but it dated, so to speak, from an *ideal* moment, namely, from the moment when the process ended *in jure*, and commenced *in judicium*. From this point of time, the same legal and material consequences followed under the process by *formula* as under the older form of proceedings known as the *legis actio*. In the time of Diocletian a fundamental change took place in Roman Civil process. The distinction as to proceedings *in jure* and *in judicium* was entirely abolished and in civil cases the entire process was conducted in the presence of official magistrates appointed by the State. In consequence of this fundamental change, the "litis contestatio," as it had existed under the *legis actio* and by the *formula* could no longer exist. The term was however still retained, and was applied to that period in the process, when under the previous modes of procedure, it would have passed from the proceedings *in jure* to those *in judicium*: in other words to that instant of time when the introductory part of the proceedings came to a close. In the time of Justinian this took place, when the *actor*, or plaintiff, having handed the *libellus* to the magistrate, a speech was made either by the *actor* or by some orator on his behalf in support of the *libellus*, after which a response was made by or in behalf of the *reus*, or the defendant, to the *peroration*, as the speech of the plaintiff was denominated. It was at the close of this

last address that the *lis contestata* dated, and it was from this moment that the same important results followed, as those to which we have already adverted, in the earlier modes of Roman civil procedure. Instit. Rom. Law, part ii. sec. 27.

181. Unde fit, ut si legitimo judicio debitum petiero, postea de eo ipso jure agere non possim, quia inutiliter intendo DARI MIHI OPORTERE; quia litis contestatione dari oportere desiit. Aliter atque si imperio continenti judicio egerim: tunc enim nihilominus obligatio durat, et ideo ipso juro postea agere possum; sed debeo per exceptionem rei judicatæ vel in judicium deductæ summoverti. Quæ autem legitima sint judicia, et quæ imperio contineantur, sequenti commentario referemus. (s)

181. Hence it comes to pass, that if I have claimed a debt before a *legitimum judicium*, I cannot afterwards sue on account of the same thing *ipso jure*, because I employed the formula "this thing ought to be given to me" (*dari mihi oportere*) improperly, since by means of the "litis contestatio" the duty to give (*dari oportere*) has ceased: it is otherwise if I have sued before a "judicium imperio continens," for then the obligation nevertheless continues, and therefore I am able subsequently to sue *ipso jure*: but I shall be rebutted by the plea "*rei judicatæ*," or "*in judicium deductæ*." We shall explain in the following commentary what is to be understood by a "*judicium legitimum*," and by a "*judicium imperio continens*."

(s) The "litis contestatio" transformed the original right of the creditor into a new one. As soon as the suit passed to the "*judicium legitimum*," the novation of the obligation extinguished *ipso jure* the former right. If the suit were "*in judicium imperio continens*," that is, under a special *judicium* as distinguished from the "*judicium legitimum*," the "litis contestatio" did not have the effect of extinguishing the previous right *ipso facto*; but it empowered the defendant to repel the plaintiff who attempted to recommence his action by the plea (exceptio) "*rei in judicium deductæ*." In the time of Justinian, the "litis contestatio" no longer operated *ipso facto* to annul the original obli-

gation, but only "exceptionis ope." See Domenget in loco, Dict. Gr. and Rom. Antiq. sub "Imperium." and bk. iv. ss. 103—109.

DE OBLIGATIONIBUS QUÆ EX DELICTO
NASCUNTUR.

182. Transeamus nunc ad obligationes quæ ex delicto oriuntur, veluti si quis furtum fecerit, bona rapuerit, damnum dederit, injuriam commiserit: quarum omnium rerum uno genere consistit obligatio, cum ex contractu obligationes in IIII genera deducantur, sicut supra exposuimus. (t)

JUST. iv. 1. pr.

OF OBLIGATIONS WHICH ARISE FROM
TORT.

182. We will now pass to those obligations which have their origin in tort (*delictum*), as for example, if anyone has committed a theft (*furtum*), has taken property with violence, has inflicted damage, has done an injury; all which acts give rise to one kind of obligation only, whilst obligations arising from contract, as we have above explained, are divided into four kinds.

(t) Obligations may not only arise from contract, or "ex lege," or "ex variis causarum figuris," but also from "delict," or, as we commonly denominate it, from "tort." This source of obligation is by far the most important, for a person may become liable in a great variety of ways through *culpa*. The general rule is, that when, by an act of a tortious character, any damage occurs to a third person, the person chargeable with the tort must make compensation to the party injured. It is in this way that claims arise for compensatory damages. In all such cases an obligation is engendered, and an action lies against the party chargeable with the delict. A question is naturally suggested: upon what principle is the amount of compensatory damages to be calculated? When the liability arises from contract, or "ex lege," the terms of the contract itself, or the provisions of the lex can alone decide the proper amount to be claimed. In other cases, no general principle can be laid down. Sometimes it may be agreed to give the "*vera rei æstimatio*,"—the present actual taxed and market value of the things; or the "*id quod interest*," which differs from the "*vera rei æstimatio*," as it takes into account all the damage that results from the injury. In most cases, however, it is the

“vera rei æstimatio” that is the measure of the obligation. When damage arises through “culpa,” or by the tortious conduct of the party, the delinquent is bound to make good all the injury that arises from his wrongful act; that is to say, all that he foresaw, or that he might have foreseen, would follow from his improper conduct. This is the penalty of “culpa.” If through misfortune acts are committed constituting an “illicitum,” for these the wrong-doer is not liable. “Culpa is said to exist when an illegal act is done under such circumstances as enable us to infer the presence of an intention to violate the law in the party chargeable. This is culpa in the widest sense of the term; and it includes every imputable offence. Culpa always supposes the freedom of the will at the time of the commission of the culpable act. There is a simple division of “culpa” into “culpa in faciendo,” and “culpa in non faciendo.” Another, and more important one, is into “culpa Aquilia” and “culpa extra legem Aquilianam.” Culpa may arise from certain relations dependent on an obligation; as the debtor failing to do that which his obligation bound him. This is termed, the “omissio diligentis debitoris.” Or the “culpa” may consist in the offending party trespassing on the legal domain of another. Of “culpa,” there are two grades—*dolus*, and *culpa* in the strict sense of the term. Culpa, in its widest meaning, includes every possible legal offence. In a narrower sense it denotes every offence that is not *dolus*. *Dolus* exists when any one does an illegal act, with a corrupt will, or adopting the old Saxon phrase from the “naughtiness of the heart.” To constitute *dolus*, the party chargeable must be conscious the act is wrong at the time he does it, and the act must be with an evil intent or will. Culpa, in the strict sense, is usually explained by the employment of other terms. Thus we say that it arises from want of diligence, or from carelessness, or frivolity, or imprudence, or thoughtlessness. There is the absence of good will, and in consequence of this, there is the lack of bias to do that which is right. The party chargeable with culpa

proves by his negligence, his carelessness, and his rashness, that he has no regard for the law, and hence he has no respect for its precepts. Culpa has been technically classed as either "culpa lata," or "culpa levis." It consists either in gross negligence or in a slight oversight or fault. Every culpa that does not amount to a "culpa lata" is said to be a "culpa levis." Ulpianus defines the grosser offence, "culpa lata," as follows: "*Lata culpa est nimia negligentia id est, non intelligere, quod omnes intelligunt.*" l. 213. s. 2. Dig. de verb. sig. (50. 16.) But "culpa lata" may arise in another way. When, for example, a man shews less care in the business of another, than he would actually have shown in his own affairs, such conduct the Roman jurists denominated as "*prope dolum*," and in such a case what would otherwise have been only "culpa levis," became "culpa lata." "Culpa levis" occupies an intermediate place between "culpa lata" and "*casus*," or mere accident. It is said to exist when any one acts as a "*diligens paterfamilias*" would not have acted under similar circumstances. Till the beginning of this century there were held to be three grades of culpa, the above-mentioned, and "culpa levissima." It is now however generally admitted, that no such *ideal* diligentia was ever regarded. The older Roman jurists sometimes spoke of "culpa levissima," but it has now been demonstrated that degrees in "culpa levis" are quite foreign to the notions of Roman jurisprudence. Professor Thibaut was the first to prove this, and since his time, Hasse, one of his most distinguished pupils, has developed his master's views, and the doctrine of Thibaut has since become the current opinion. Hasse on Culpa, Kiel. 1815. 2. edit. by Bethmann, Hollweg. 1838. The entire discussion on this point, may be seen in Von Vangerow's Pandecten. vol. i. p. 180, notes; Instit. Rom. Law. part. ii, s. 2. The following fundamental principle as to the amount of "culpa" for which a person is liable, is worthy of the most careful consideration. When there is in connection with the obligation, or arising out of it, an advantage or interest

for the party who may become liable, and if this interest be either for himself alone, or for others conjointly with him, then this party is liable for "omnis culpa." Again, if the party has no personal interest himself, he is only answerable for "dolus" and "culpa lata." The point that decides is the "interesse." When, therefore, there is the slightest personal interest, the general rule is, although it is not stated in so many words in the "Corpus Juris," that the party will be held liable for "levis culpa."

183. *Furtorum autem genera Servius Sulpicius et Masurius Sabinus (u) IIII esse dixerunt, manifestum et nec manifestum, conceptum et oblatum: Labeo duo, manifestum, nec manifestum; nam conceptum et oblatum species potius actionis esse furto cohærentes quam genera furtorum; quod sane verius videtur, sicut inferius apparebit.*

183. Now, Servius Sulpicius and Masurius Sabinus affirm that there are four kinds of thefts (*furta*), "manifestum" and "nec manifestum," "conceptum" and "oblatum." According to the opinion of Labeo there are only two kinds: "manifestum" and "nec manifestum;" the "conceptum" and "oblatum" being rather species of action pertaining to theft than kinds of theft; which view indeed seems to be the more correct one, as will be shown hereafter.

(u) Masurius Sabinus was of the school of Capito, and one of the great schools of Roman lawyers took its name from him, although Capito was the actual head of the sect. Gaius mentions him as the original founder of this school. "Sabinus quidem et Cassius ceterique nostri præceptores." Sabinus lived in great poverty, but by the force of genius, when fifty years of age, he rose to the equestrian order, and, under Tiberius, appears to have obtained the *jus respondendi*. His principal work was the "*Libri Tres Juris Civilis*," a book containing a short abridgement of the law. This work was freely commented upon by succeeding jurists. Thus, Pomponius wrote at least thirty-six "*libri ad Sabinem*," many extracts of which are in the Pandects. Instit. Rom. Law. pp. 118, 119. Gaius, i. 196. ii. 15. Puchta's Instit. i. 444, 445.

184. Manifestum furtum quidam id esse dixerunt quod dum fit deprehenditur. Alii vero ulterius, quod eo loco deprehenditur ubi fit: velut si in oliveto olivarum, in vineto uvarum furtum factum est, quamdiu in eo oliveto aut vineto fur sit; aut si in domo furtum factum sit, quamdiu in ea domo fur sit. Alii adhuc ulterius, *eousque* manifestum furtum esse dixerunt, donec perferret eo quo perferre fur destinasset. Alii adhuc ulterius, quandoque eam rem fur tenens visus fuerit; quæ sententia non optinuit. Sed et illorum sententia qui existimaverunt, donec perferret eo quo fur destinasset, deprehensum furtum *manifestum esse improbata est, quod videbatur aliquam admittere* dubitationem, unius diei an etiam plurium dierum spatio id terminandum sit. Quod eo pertinet, quia sæpe in aliis civitatibus surreptas res in alias civitates vel in alias provincias destinat fur perferre. Ex duabus itaque superioribus opinionibus alterutra adprobatur: magis tamen plerique posteriorem probant. (v)

184. "Furtum manifestum" is, according to the opinion of some, that kind of theft in which the thief is caught upon the very spot where the offence is committed: as for example, if a theft of olives is committed in an olive-grove, or a theft of grapes in a vineyard, as long as the thief is in the olive-grove or the vineyard, or if the theft has been committed in a house, so long as the thief is in the house, it is a *manifest* theft. According to the views of others who go still further, the *furtum* is held to be *manifestum*, until the thief (*fur*) has brought the stolen property to the place to which he had intended to transfer it. The opinion of others goes even still further, for it is thought that the *furtum* continues *manifestum* so long as the thief is seen holding the thing in his hand. This last opinion has not been maintained. But the opinion also of those who have thought that the theft is *manifestum* if it has been discovered before the thief has brought the stolen property where he had intended, has been disapproved of, because it seemed to raise a doubt whether it should be limited to the space of one day, or even extended to several days. And this stands related to another point, because the thief has often the intention of carrying the property which he has stolen in certain cities, into other cities, or even into other provinces. Hence, the two first opinions, the one as well as the other, are approved of; still most jurists accept the latter of the two.

(v) Paulus defines a manifest and a non-manifest thief as follows: "Manifestus fur est, qui in faciendo deprehenditur, et qui intra terminos ejus loci quo destinaverat per-

veniret. Nec manifestus fur est, qui in faciendo quidem deprehensus non est; sed eum furtum fecisse negari non potest." Recep. Sent. ii. 31. s. 2. Gellius defines a "manifest theft" in the following terms: "Manifestum autem furtum est, ut ait Macurius, quod deprehenditur dum fit. Faciendi finis est, cum perlatum est quo ferri coeperat." Gellius, xi. c. 18. s. 11. ll. 2. 8. 34. pr. 35. pr. Dig. de furt. (47. 2.) Domenget says that according to the French criminal code of instruction the delict is *flagrant* when the thief is found in possession of the stolen property at a time not remote from the commission of the offence: "dans un temps voisin du délit." Domenget in loco. The lacuna in the text is taken almost entirely from Lachmann. Huschke now prefers the reading, "Manifestum esse a plerisque improbata est, quoniam moveret dubitationem utrum." See l. 4. Dig. tit. cit. (47. 2.)

185. Nec manifestum furtum quod sit, ex iis quæ diximus intellegitur: nam quod manifestum non est, id nec manifestum est.

185. What is a "furtum nec manifestum" may be understood from what we have said: for what is not "manifestum" that is "nec manifestum."

JUST. iv. 1. 3.

186. Conceptum furtum dicitur, cum aput aliquem testibus præsentibus furtiva res quæsita et inventa est; nam in eum propria actio constituta est, quamvis fur non sit, quæ appellatur concepti. (w)

186. That *furtum* is said to be *conceptum*, when a thing stolen has been sought and found with some one in the presence of witnesses: for against him a peculiar action has been constituted, the so-called "concepti actio," even though he is not the thief.

JUST. iv. 1. 4.

(w) Paulus with his usual care and precision, explains who is liable both in the case of *conceptum furtum* and *oblatum furtum*. "Concepti actione is tenetur apud quem furtum quæsitum et inventum est. Oblati actione is tenetur qui rem furtivam alii obtulit. Ne apud se inveniretur." And then he adds, "Concepti is agere potest qui rem concepti,

at invenit. Oblati is agere potest penes quem res concepta et inventa est." Recep. Sent. ii. 31. 35.

187. Oblatum furtum dicitur, cum res furtiva tibi ab aliquo oblata sit, eaque aput te concepta sit; utique si ea mente data tibi fuerit, ut aput te potius quam aput eum qui dederit conciperetur. Nam tibi, aput quem concepta est, propria adversus eum qui optulit, quamvis fur non sit, constituta est actio, quæ appellatur oblati.

187. That *furtum* is called *oblatus* when a thing stolen has been brought you by some one, and that thing has been found with you; at least if it has been given to you with the intention that it may be found with you rather than with him who has given it. For to you with whom it is found there is a peculiar action given against him who has brought the thing to you, the so-called *actio oblatis*, although such person is not the thief.

JUST. iv. 1. 4.

188. Est etiam prohibiti furti adversus eum qui furtum quærere volentem prohibuerit.

188. There is also an action, *prohibiti furti*, against him who has hindered any one desirous of seeking after a thing stolen.

JUST. iv. 1. 4.

189. Poena manifesti furti ex lege XII tabularum capitalis erat. Nam liber verberatus addicebatur ei cui furtum fecerat; (utrum autem servus efficeretur ex addictione, an adjudicati loco constitueretur, veteres quærebant); *servum* aequè verberatum *e saxo deiciebant*.^(x) Postea improbata est asperitas poenæ, et tam ex servi persona quam ex liberi quadrupli actio Prætoris edicto constituta est.

189. The punishment for a "*furtum manifestum*," according to the law of the Twelve Tables, was capital. For a free man after having been scourged, was adjudged to him (*addicibatur*) from whom he had stolen the thing; but whether in consequence of this adjudication he became a slave, or was simply regarded in the place of an *adjudicatus*, was a question of dispute with the ancients; it was the custom likewise to hurl slaves, after they had been scourged, from the Tarpeian rock. Subsequently this exceedingly severe punishment was disapproved of; and by means of the Prætorian edict an action for the four-fold was constituted, as well for slaves, as for free persons.

(x) *E saxo deiciebant*. This is Lachmann's reading, and has been adopted by Gneist. Goeschen proposes to read, "servo autem qui verberatus saxo deiciebatur." Boecking adopted the reading of Gneist in his second and third editions, but has since expunged it. He states as his reason the following: "Nunc vero expunxi, tum propter hujus argumenti incertitudinem, tum quod Lach. supplementum durius quam quod Gaio conveniret, videretur." See Boecking in loco.

It was not uncommon to punish by hurling from the Tarpeian rock. Thus when Marius and Sulpicius fled from Sulla, the slave who betrayed Sulpicius was rewarded with his freedom, and then put to death by being hurled from the Tarpeian rock.

190. Neo manifesti furti poena per legem XII tabularum dupli inrogatur; quam etiam Prætor conservat.
(y)

190. The punishment for a "furtum nec manifestum" by the law of the Twelve Tables was fixed at the double (*dupli inrogatur*), and this has been retained by the prætor.

(y) Furtum, or theft, is the term employed to denote the illegal and fraudulent dealing with a thing, with the intention of making gain by it. It is defined as follows: "Furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus ejus, possessionisve." It was one of the four kinds of delicts which were the foundation of obligations. The others were, "Damnum injuria datum;" "Vi bonorum raptorum;" and "Injuria." A Furtum was said to be "manifestum" when the thief was discovered and siezed, before he had been able to bring the stolen property into a place of concealment. In all other cases it was "nec manifestum." By a special prescription this offence could not be committed by abstracting things from the "hereditas jacens" before the heir had entered, or had taken the inheritance into his possession. There could be no Furtum between husband and wife, but as there might be

what was denominated an “*amotio rerum*,” there was an action in such a case, for the recovery of the property which was designated the “*actio rerum amotarum*.” The legal remedies for theft were the “*condictio furtiva*,” and the “*actio furti*.” The “*actio furti*” was a purely penal action and not only might the owner of the property be the plaintiff, but any one who might be injured by the theft. Nor was the thief alone liable, but also his accomplices, and when there were several they were held liable “*in solidum*.” This action could not be prosecuted against the heirs of the guilty parties. When the *furtum* was “*manifestum*,” the suit was for a “*quadruplum*,” when it was “*nec manifestum*” it was for a “*duplum*.” The “*condictio furtiva*” was denominated a “*rei persecutio cum omni causa*,” that is to say, it was a suit for the thing stolen, and to use a modern phrase, “for all its surroundings.” The thief had no claim for compensation, nor for any expenses that he might have incurred; and he was held liable, not only for “*culpa levis*,” but also for accident (*casus*). If the thing stolen were destroyed or perished, he was liable in compensatory damages which were to be measured by the greatest value that the thing had whilst in his illegal possession. It was only the owner that could avail himself of the “*condictio*,” and he must be such at the time when he commenced his action. The thief and his heirs were all liable, but not the heirs of his accomplices, and when there were several thieves they were each liable “*in solidum*.” Moehler’s *Pandecten*, pp. 142, 143.

191. *Concepti et oblati pœna ex lege XII tabularum tripli est; quæ similiter a Prætoris servatur.*

191. The penalty for a “*furtum conceptum et oblatum*,” in accordance with the law of the Twelve Tables, was threefold, this likewise was retained by the prætors.

192. *Prohibiti actio quadrupli ex edicto Prætoris introducta est. Lex autem eo nomine nullam pœnam constituit: hoc solum præcepit, ut*

192. The *actio prohibiti* was introduced by the edict of the prætor for the fourfold (*quadrupli*). But the law of the Twelve Tables had

qui quærere velit, nudus quærat, linteo cinctus, lancem habens; qui si quid invenerit, jubet id lex furtum manifestum esse.

constituted no penalty of this kind (*eo nomine*); it only enjoined that he who wishes to search, shall do so undressed, girt with a piece of linen and bearing a dish; and if he find the stolen thing the law says that the theft is *manifestum*.

193. Quid sit autem linteum, quæsitum est. Sed verius est consuti genus esse, quo necessariæ partes tegerentur. Quare lex tota ridicula est. Nam qui vestitum quærere prohibet, is et nudum quærere prohibiturus est: eo magis quod ita quæsita res inventa majori pœnæ subiciatur. Deinde quod lancem sive ideo haberi jubeat, ut manibus occupantis nihil subiciatur, sive ideo ut quod invenerit, ibi imponat: neutrum eorum procedit, si id quod quærat ejus magnitudinis aut naturæ sit, ut neque subici neque ibi imponi possit. Certe non dubitatur, ejuscumque materiæ sit ea laus, satis legi fieri. (z)

193. The question has been asked, what was this linen (*lintheum*)? According to the more correct opinion, it was a kind of covering sewn together (*consuti*) for the purpose of covering the private parts. Hence, the entire law was ridiculous. For he who prohibits any one to search clothed, will also prevent the search being made by one unclothed; so much the more, since a thing thus sought, if it be found would subject to a greater punishment. Further, the law ordained that he should carry a dish, either that by the hands being occupied nothing should be concealed, or in order that he might put in it whatever might be found; neither, however, of these two objects could be gained, if what is sought were of such a magnitude or nature, that it could neither be concealed nor placed therein. Certainly no one doubts that the law is satisfied, whatever material the dish may be made of.

(z) By the term *furtum concipere* is to be understood the looking for stolen property at the house of anyone and there finding it. The *actio furti concepti* lay against the receiver of stolen goods. See also note to iii. 186. "Lance et licio dicebatur apud antiquos, quia qui furtum ibat quærere in domo aliena, licio cinctus intrabat, lancemque ante oculos tenebat propter matrum-familias aut virginum præsentiam." Festus p. 119. ad Müller. See Hein. Jur. Ant. lib. iv.

tit. i., where this subject is very fully discussed. Mühlenthal, who was one of the ablest of the modern German jurists, thought that this part of Gaius was not very satisfactorily expressed, and in remarking upon Haubold's opinion that Gaius had not distinguished the customs in different periods with sufficient clearness, exclaims, "Quis de eo dubitet? Potius equidem dixerim, hunc quoque locum esse argumento minime Gaium attento animo, quin velut ascitantem ac somniantem omnem hanc rem egisse." See note *u* to Hein. Ant. Rom. tit. cit. There seems to be no doubt, that this singular custom was of Greek origin, for it is referred to by Aristophanes in the Clouds, at v. 496, in the colloquy between Socrates and Strepsiades. The person in search of the stolen property was all but naked, having on only the *licium*, and carrying in his hand the *lanx* or basin. What was intended by the last named article has given rise to a good deal of discussion. Some of the ancients held that it was carried before the face as a kind of mask, to conceal the shame of the wearer as already cited, "propter matrum-familias aut virginum presentiam." Others thought it was to place the stolen property in if it should be found. Puchta thought that the more probable reason was that the hands might be employed by holding the *lanx* over the head. If the stolen property were found, the theft was called "lance et liceo furtum conceptum." All the opinions will be found collected in Heinnecius in the passage above cited. See also Puchta's Instit. vol. iii. pp. 121, 122. At a later period this custom was abolished, and the search was made in the presence of witnesses.

194. Propter hoc tamen, quod lex ex ea causa manifestum furtum esse jubet, sunt qui scribunt furtum manifestum aut lege aut natura *intellegi*: lege id ipsum de quo loquimur; natura illud de quo superius exposuimus. Sed verius est natura tantum manifestum furtum intellegi. Neque enim lex facere potest, ut qui mani-

194. Yet on this account, because the law says that for such a reason the theft (*furtum*) shall be *manifestum*, there are some who affirm in their writings that *furtum* is to be regarded as *manifestum*, either according to the law or according to its nature. According to law in the case of which we speak, according to its nature in

festus fur non sit, manifestus sit, non magis quam qui omnino fur non sit, fur sit, et qui adulter aut homicida non sit, adulter vel homicida sit: at illud sane lex facere potest, ut perinde aliquis pœna teneatur atque si furtum vel adulterium vel homicidium admisisset, quamvis nihil eorum admiserit.

the case we have explained before. But the more correct view is that a *furtum* is to be regarded as *manifestum* only in accordance with its nature. For the law cannot operate so as to make one who is not a manifest thief (*manifestus fur*) to be regarded as such, any more than it can make him, who indeed is not a thief at all, to be treated as such, or one who is not an adulterer or a murderer, that he should be regarded as an adulterer or manslayer: but the law can doubtless so operate that anyone may be punished as if he had committed theft (*furtum*), or adultery, or killed a man, even if he have not actually committed any of these offences.

195. *Furtum autem fit non solum cum quis interceptiendi causa rem alienam amovet, sed generaliter cum qui rem alienam invito domino contrectat. (a)*

195. But a theft (*furtum*) is not only committed when anyone, for the sake of stealing, takes a thing away, but generally as soon as anyone lays hold of the property of another against the will of the owner.

(a) There could be no *furtum* unless there was an intention to obtain some benefit in an illegal manner. Such an intention might extend either to the entire thing, or to a particular advantage, as for instance an illegal conversion of a thing to one's use, or an illegal possession. Thus Gellius says, "Verba sunt Sabini ex libro juris civilis secundo: qui alienam rem attrectavit, cum id se invito domino facere judicare deberet, furti tenetur, item alio capite: qui alienum tacens lucri faciundi causa sustulit, furti obstringitur sive scit cujus sit, sive nescit." vii. 15. The owner under certain circumstances might commit a theft upon his own property, and there might also be a theft of a free-man, who was under the potestas of another. l. 15. s. 1. l. 19. s. 6. Dig. de furt. (47. 2.); Puchta's Instit. vol iii. p. 120. et seq.

196. Itaque si quis re quæ apud eum deposita sit utatur, furtum committit. Et si quis utendam rem acceperit eamque in alium usum transtulerit, furti obligatur. Velut si quis argentum utendum acceperit, quod quasi amicos ad cenam invitaturus rogaverit, et id peregre secum tulerit, aut si quis equum gestandi gratia commodatum longius secum aliquo duxerit; quod veteres scripserunt de eo qui in aciem perduxisset.

196. Therefore, anyone commits a *furtum*, if he makes use of a thing which has been deposited with him. And if anyone having accepted a thing for a certain use has employed it in a different manner, he is liable in an action of theft: for example, if a person has borrowed silver-plate (*argentum*) because perhaps he wishes to invite friends to a repast, and afterwards takes it with him into the country; or if anyone having borrowed a horse for the purpose of taking a ride on horseback, has kept it for a longer time, and takes it farther than was agreed; as in the example given by the ancient jurists in their writings of one who had led the horse into battle.

JUST. iv. 1. 6.

197. Placuit tamen eos qui rebus commodatis aliter uterentur quam utendas accepissent, ita furtum committere, si intellegant id se invito domino facere, eumque, si intellexisset, non permissurum; et si permissurum crederent, extra furti crimen videri: optima sane distinctione, quia furtum sine dolo malo non committitur.

197 Still, it is a received opinion that those who have used things lent (*rebus commodatis*), in a manner differing from that for which they had borrowed them, only commit theft (*furtum*) if they understand that they are acting against the will of the owner (*invito domino*), and that he, if he had known, would not have allowed it; for if they believe that he would permit it, they do not seem to be chargeable with theft; this is certainly an excellent distinction, because a theft cannot be committed where there is no *dolus malus*.

JUST. iv. 1. 7.

198. Sed et si credat aliquis invito domino se rem contrectare, domino autem volente id fiat, dicitur furtum non fieri. Unde illud quæsitum est, cum Titius servum meum sollicitarit, ut quasdam res mihi subriperit et ad eum perferret, et servus id ad me pertulerit, ego, dum volo Titium in ipso delicto depre-

198. But also if anyone thinks that he is taking a thing against the will of the owner, the owner being at the same time willing, it is said that no theft (*furtum*) is committed. Hence the following question is raised: if Titius has incited my slave to steal certain things from me, and to bring them to him, and the slave has given

hendere, permiserim servo quasdam res ad eum perferre, utrum furti, an servi corrupti iudicio teneatur Titius mihi, an neutro: responsum, neutro eum teneri, furti ideo quod non invito me res contractarit, servi corrupti ideo quod deterior servus factus non est. (b)

JUST. iv. 1. 8.

(b) The text has been restored where defective from the Institutes of Justinian; s. 8. de obligat. quæ ex delicto nasc. (4. l.) and it varies in Huschke's opinion in important points from the MS. After "unde illud quæsitum," he proposes to read "et probatum est;" and a little lower down he thinks it better to read, "Dum volo Titium in ipso delicto deprehendere permisi servo, quasdam res ad eum perferre quæsitum est, utrum furti, etc." This, he affirms, will make the text agree with the explanation given by Theophilus. In the Institutes, "probatum est" is omitted, and the whole passage is included in a single period; because, whilst Gaius was transcribing from a collection of Responses, Justinian referred to the subject as a dispute among the older jurists, in order that he might pronounce his own decision of the question under consideration; hence he says "per nostram decisionem sanximus." Huschke's Kritik, pp. 103, 104.

199. Interdum autem etiam liberorum hominum furtum fit, veluti si quis liberorum nostrorum qui in potestate nostra sunt, sive etiam uxor quæ in manu nostra sit, sive etiam iudicatus vel auctoratus (c) meus subreptus fuerit.

JUST. iv. 1. 9.

information to me, but I, in order to catch Titius in the very act, permit my slave to bring certain things to him, is a *furtum* committed, or is Titius liable to me in an action for the corruption of my slave (*servi corrupti iudicium*), or is neither the one nor the other? It has been said (*responsum*) that he is not liable to either action, not indeed in an action of theft (*furti iudicium*), because he has not taken the thing away against my will, and not in an action for the corruption of my servant (*servi corrupti iudicium*) because my slave has not been made worse.

199. But sometimes a theft (*furtum*) may be committed on a free man, for example, if anyone shall have kidnapped one of our children under our *potestas*, or our wife who is in our *manus*, or anyone adjudicated to us by the sentence of a judge or even my gladiator.

(c) An *auctoratus* was one who had bound himself to do anything for hire or payment. It is here applied to one who was engaged to fight as a gladiator. Thus Paulus in speaking of those persons whom it was lawful to slay ("quas viro liceat occidere"), mentions among others, "Qui auctoramento rogatus est ad gladium, vel etiam illum, qui operas suas, ut cum bestias pugnaret, locavit." Mos. et Rom. leg. col. iv. 3. 2.

200. Aliquando etiam suæ rei quisque furtum committit, veluti si debitor rem quam creditori pignori dedit subtraxerit, vel si bonæ fidei possessori rem meam possidenti subriperim. Unde placuit eum qui seruum suum quem alius bona fide possidebat ad se reversum celaverit furtum committere.

JUST. iv. 1. 10.

201. Rursus ex diverso interdum rem alienam occupare et usucapere concessum est, nec creditur furtum fieri, velut res hereditarias quarum non prius nactus possessionem necessarius heres esset; nam necessario herede extante placuit, ut pro herede usucapi possit. Debitor quoque qui fiduciam quam creditori mancipaverit aut in jure cesserit detinet, ut superiore commentario rettulimus, sine furto possidere et usucapere potest.

202. Interdum furti tenetur qui ipse furtum non fecerit: qualis est cujus ope consilio furtum factum est. In quo numero est qui nummos

200. In some cases a man commits a *furtum* even on his own property. For example, if a debtor who has given a thing in pledge to his creditor, takes it secretly away, or if I have carried off a thing belonging to me from a *bona-fide* possessor. Hence, it has been held that he who has concealed the return of his escaped slave possessed *bona-fide* by another, commits a theft (*furtum*).

201. Again, on the other hand, sometimes the occupation and usucapion of a thing belonging to another person is allowed, and it is considered that no *furtum* is committed; for example, things appertaining to the inheritance, of which the necessary heir (*heres necessarius*) has not previously obtained the possession; for if there be a necessary heir, it is held that usucapion may be made in the place of the heir (*pro herede*). Also the debtor who detains the *fiducia* which has been mancipated or ceded *in jure* to the creditor, as we have explained in the second book, can both possess a thing and hold it by usucapion without committing a theft.

202. Sometimes a person is held liable for *furtum*, who has not himself committed the theft: as is he by whose aid and help a *furtum* has been

tibi excussit, ut eos alius surriperet, vel opstitit tibi, ut alius surriperet, aut oves aut boves tuas fugavit, ut alius eas exciperet; et hoc veteres scripserunt de eo qui panno rubro fugavit armentum. Sed si quid per lasciviam, et non data opera, ut furtum committeretur, factum sit, videbimus an utilis *Aquilie actio* dari debeat, cum per legem *Aquiliam* quæ de damno lata est etiam culpa puniatur. (d)

committed. In which number is one who has upset your coins (*nummos*) that another may steal them, or has put himself in your path that another may rob you, or has put to flight your sheep or oxen, in order that another may catch them; and this the ancients have written concerning him who with a red cloth has put to flight a herd of cattle. But if anything has happened from mere wantonness, and not with the intention that a theft (*furtum*) should be committed, we shall see whether a "*utilis Aquilie actio*" ought to be given, since, by means of the *Aquilian* law, passed to award injury for damage done to another, *culpa* also is made punishable.

(d) The accomplices of a thief were held liable by the *actio furti* just as the thief himself. They were, however, only regarded as accomplices when they were joined with him in the same intention and wilfully aided him in his designs. Unless they had rendered aid intentionally, they were not regarded as accomplices. *Domenget in loco*.

203. Furti autem *actio* ei competit cujus interest rem salvam esse, licet dominus non sit: itaque nec domino aliter competit, quam si ejus intersit rem non perire.

203. An action of theft (*actio furti*) is given to him who has an interest in the preservation of the property, although he may not be the owner; therefore it is only given to the owner, when he has a legal interest in the maintenance of the thing.

204. Unde constat creditorem de pignore subrepto furti agere posse; adeo quidem, ut quamvis ipse dominus, id est ipse debitor, eam rem subriperit, nihilominus creditori competit *actio furti*.

204. Whence it is manifest that the creditor may employ the "*actio furti*" when the thing pledged to him is stolen (*de pignore subrepto*), so that indeed the creditor can avail himself of the "*actio furti*," even if the owner, that is to say the debtor himself, has furtively taken the thing

205. Item si fullo polienda curandave, aut sarcinator sarcienda vestimenta mercede certa acceperit, eaque furto amiserit, ipse furti habet actionem, non dominus; quia domini nihil interest ea non perisse, cum iudicio locati a fullone aut sarcinatore suum persequi possit, si modo is fullo aut sarcinator ad rem præstandam sufficiat; nam si solvendo non est, tunc quia ab eo dominus suum consequi non potest, ipsi furti actio competit, quia hoc casu ipsius interest rem salvam esse.

206. Quæ de fullone aut sarcinatore diximus, eadem transferemus et ad eum cui rem commodavimus; nam ut illi mercedem capiendo custodiam præstant, ita hic quoque (e) utendi commodum percipiendo similiter necesse habet custodiam præstare.

(e) The reading "Ita hic quoque" is from Goeschen. It has met with the approval of both Boecking and Huschke. The MS. has *hi*, and the older reading was *is*. Huschke affirms that only *hic* can be the proper antithesis of the word *illi* used in the previous sentence. Kritik, p. 103.

207. Sed is aput quem res deposita est custodiam non præstat, tantumque in eo obnoxius est, si quid ipse dolo fecerit: qua de causa si res ei subrepta fuerit quæ restituenda est, ejus nomine depositi non tenetur, nec ob id ejus interest rem salvam esse: furti itaque agere non potest; sed ea actio domino competit.

205. Again, if either a fuller receives garments to calender, or a tailor accepts them to mend for a fixed sum, and the garments are lost by theft, the bailee himself and not the owner has the "actio furti;" for the owner has no legal interest in their preservation, since he can by means of the action of hiring (*iudicio locati*) recover its value from the tailor or fuller, if only the fuller or tailor have sufficient means to pay; but if he be not solvent, then because the owner cannot recover the value from him, he is entitled to the "actio furti," since, in this case, he himself has a legal interest in the preservation of the thing.

206. What we have stated in regard to the fuller or the tailor, may be also considered as equally applicable to the borrower; for as he who takes a rent must be answerable for the care of the thing, so also the borrower by accepting the use of a thing ought equally to be answerable for the custody of the thing lent.

207. But he with whom a thing is deposited is not answerable for the charge thereof, and is himself only liable for what he has done wilfully wrong (*dolo malo*). For which reason if the thing which he ought to restore has been stolen from him, he is not answerable for it in an *actio depositi*, and has also no interest in

the preservation of the thing; therefore he is not entitled to the *actio furti*, but that action appertains to the owner.

208. In summa sciendum est quæsitum esse, an impubes rem alienam amovendo furtum faciat. Plerisque placet, quia furtum ex adfectu consistit, ita demum obligari eo crimine impuberem, si proximus pubertati sit, et ob id intellegat se delinquere. (f)

208. To conclude, we ought to know that the question has been asked, whether a minor by taking the property of another, commits a theft; most jurists are of opinion that since theft consists in the intention (*ex adfectu consistit*), the minor is only liable for this offence when he draws near to puberty (*proximus pubertati*), and consequently knows that he is committing an offence.

(f) A minor was not held to be criminally liable, unless he were *doli capax*. Infants—that is, children of both sexes before the age of seven years—were *doli incapax*. From the seventh year to the age of puberty children were either *infantiæ* or *pubertati proximi*, according as they were nearer to the age of infancy or puberty. Gensler maintains that the accountability of children should depend entirely upon their degree of intellect. Archiv. Civ. Prax. vol iv. p. 316. But when youth approaches towards maturity (*pubertati proximi*) then the Germans say “Bosheit erfüllt das Alter,” or “Wickedness serves for age,” a maxim derived from the Canon law, where “*Malitia ætatem supplet*” must be taken with the same modification. Mittermaier thought that the rule of the Canon law rested upon a misunderstanding of l. 3. Cod. si minor se major dex., etc. (2.43), and says that in modern jurisprudence it should be left to the judge to decide whether the minor be *doli capax* or *incapax*. Recent legislation in Europe delays the accountability of children till a later period than seven years, and lays down the rule that even till after that period the child is only amenable to parental correction, or to that public correction

which is substituted for it. Nothing is left to conjecture in the case of childhood, either for or against accountability. The law lays down no fixed rule, but it imposes upon the judge the duty of deciding in every individual case. When childhood is held to be accountable a milder punishment is deemed sufficient than would be inflicted upon an adult criminal. Again, the grounds on which accountability is to be decided are the following: the manner in which the offence was committed; the actual age of the offender; the physical condition of the child—especially whether puberty has been attained; the amount of culture of the intellectual and moral powers, in connection with which it ought to be carefully ascertained whether the physical and intellectual condition of the offender be such as to constitute an impediment to accountability. According to the French Crim. Code, art. 66, the age of sixteen is held to be the age of criminal accountability: “Lorsque l’accusé aura moins de seize ans, s’il est décidé qu’il a agi *sans discernement*.” The article then goes on to say that the child charged with an offence will be acquitted, but that, according to circumstances, he will be either remitted to his parents, or sent to a reformatory to be brought up and detained during such a number of years as the judge shall determine, which shall not extend beyond his twentieth year. For the punishment of death, in capital cases the juvenile offender is sentenced to hard labour and imprisonment in a House of Correction. Upon this interesting and important subject, and for an account of the liability of children in the different German states, see Feuerbach *Lehrbuch des pein. Rechts*, edit. Mittermäier, Giessen, 1847, secs. 90, 90a, especially note 13.

DE VI BONORUM RAPTORUM.

209. Qui res alienas rapit tenetur etiam furti: quis enim magis alienam rem invito domino contrectat quam qui rapit? Itaque recte dictum est eum improbum furem esse. Sed propriam actionem ejus delicti nomine

CONCERNING GOODS FORCIBLY TAKEN.

209. He who takes away forcibly the property of another (*rapit*), is also liable for theft, for who takes the property of another more against the will of the owner (*invito domino*), than he who seizes it with violence?

Prætor introduxit, quæ appellatur *vi bonorum raptorum*; et est intra annum quadrupli actio, post annum simpli. Quæ actio utilis est, et si quis unam rem, licet minimam, raperit.

Hence it has been rightly said, that such a one is the worst of robbers (*improbum furem*). But the prætor has introduced a special action for this offence which is called "*vi bonorum raptorum*;" and it is an action for the four-fold (*quadrupli*) within the year, after the first year for the simple value (*simpli*). This action is a "*utilis actio*," even if any one has taken a single thing by violence, however small it may be.

210. *Damni injuriæ actio constituitur per legem Aquiliam. Cujus primo capite cautum est, ut si quis hominem alienum, eamve quadrupedem quæ pecudum numero sit, injuria occiderit, quanti ea res in eo anno plurimi fuerit, tantum domino dare damnetur.* (g)

210. The action for unjust damage, (*damni injuriæ*) is established by means of the Aquilian law (*lex Aquilia*), in the first chapter of which it is provided, that if anyone has illegally killed another's slave, or one of those quadrupeds that are accounted as cattle (*pecudes*) he shall be condemned to pay to the owner that amount which was the highest value of the thing at any time during the previous year.

(g) The words of the first chapter of the Aquilian law are found in the Digest, and are as follows: "*Qui servum servamve alienum alienamve, quadrupedemve pecudem injuria occiderit, quanti id in eo anno plurimi fuerit, tantum æs dare domino damnas esto.*" 1. 2. pr. Dig. ad leg. Aquil. (19. 2.) The actions given by the *lex Aquilia* were for injuries done directly and by actual contact (*corpore*). Subsequently, however, as we learn from the present passage, a "*utilis actio*" was given if the injury were done *corpore*, but not *corpore*. Ulpianus informs us that it was a plebiscitum, and that it was passed upon the rogation of the Tribune Aquilius, in the year 467 A.U.C. It had the effect of repealing all preceding laws upon the subject; both those of the Twelve Tables as well as any others. "*Lex Aquilia omnibus legibus, quæ ante se de damno injuria locutæ sunt*

derogavit, sive duodecim tabulis, sive alia quæ fuit; quas leges nunc referre non est necesse. Quæ lex Aquilia plebiscitum est, quum eam Aquilius Tribunis plebis a plebe rogaverit." l. 1. Dig. ad leg. Aquil. (9. 2.)

211. Is injuria autem occidere intellegitur cujus dolo aut culpa id acciderit, nec ulla alia lege damnum quod sine injuria datur reprehenditur: itaque impunitus est qui sine culpa et dolo malo casu quodam damnum committit.

211. But he is understood to kill illegally, by whose deceit (*dolus*) or fault (*culpa*) death may have happened, and by no other law is loss arising without an illegal act punishable; hence he goes unpunished who without fault or deceit (*dolus malus*), commits damage by mere accident.

212. Neo solum corpus in actione hujus legis æstimatur: sed sine si servo occiso plus dominus capiat damni quam pretium servi sit, id quoque æstimatur: velut si servus meus ab aliquo heres institutus, ante quam jussu meo hereditatem cerne-ret, occisus fuerit; non enim tantum ipsius pretium æstimatur, sed et hereditatis amissæ quantitas. Item si ex gemellis vel ex comoedis vel ex symphoniacis unus occisus fuerit, non solum occisi fit æstimatio, sed eo amplius quoque computatur quod ceteri qui supersunt depretiati sunt. Idem juris est etiam si ex pari mularum unam, vel etiam ex quadrigis equestrum unum occiderit. (h)

212. Not only the value of the thing slain is estimated in the action given by this law; but if indeed the owner has sustained special damage by the death of his slave, that also is estimated; for example, if my slave, having been instituted heir by anyone, shall be killed before he has made *cretio* of the inheritance by my order; for not only is the value of the slave himself estimated in this case, but also the amount of the lost inheritance. Again, if from a span of cattle, or from a company of actors, or of musicians, one has been slain, not only is the value of the one slain taken into account, but allowance is made in the estimate for the depreciation in value of those which still survive. The same rule of law is applicable if one out of a pair of mules, or even one out of a double span of horses has been slain.

(h) The lex Aquilia had for its object the punishment of an injury done in violation of the law, that is to say, by the culpable act of the wrong-doer. Thus Ulpianus says, "In lege Aquilia et levissima culpa venit." l. 44. Dig. ad

leg. Aquil. (9. 2). The first chapter refers to the case where slaves or certain animals have been slain ; as horses, mules, asses, oxen, sheep, goats and pigs. The text explains the means by which the valuation was to be made. In the next section we see that there were two remedies for the party injured. He might avail himself either of a public accusation (*capitali crimine eum reum facere*), or he might employ the remedy given by the Aquilian law (*vel hac lege damnum persequi*), s. 11. Instit. de leg. Aquil. (4. 2.) Domenget thinks that it follows from an examination of the different passages that the actions might be cumulative, an opinion which has been not without reason gravely doubted. See Domenget in loco, and also l. 3. Cod. ad leg. Aquil. (3. 33.)

213. Cujus autem servus occisus est, is liberum arbitrium habet vel capitali crimine reum facere eum qui occiderit, vel hac lege damnum persequi.

213. But he whose slave is killed has the free choice either to sue the defendant who has killed him for the capital offence, or to proceed under this law for compensatory damage.

214. Quod autem adjectum est in hac lege: QUANTI IN EO ANNO PLURIMI EA RES FUERIT, illud efficit, si clodum puta aut luscum servum occiderit, qui in eo anno integer fuerit, ut non quanti mortis tempore sed quanti in eo anno plurimi fuerit, æstimatio fiat. Quo fit, ut quis plus interdum consequatur quam ei damnum datum est.

214. But the clause in this law "how much in that year the highest value of that thing has amounted to" (*Quanto in eo anno plurime ea res fuerit*), thus operates ; that if for instance a lame or partially blind slave has been killed, which in the previous part of the year had been sound of body, the valuation is not to be taken according to the worth of the thing at the time of its destruction but according to the highest value it attained in that year. And thus it comes to pass, that sometimes a person obtained as a recompense more than the value of the damage done to him.

215. Capite secundo in adstipulatorem qui pecuniam in fraudem stipulatoris acceptam fecerit, quanti ea res est, tanti actio constituitur. (i)

215. The second chapter of the lex Aquilia relates to the adstipulator, who in fraud of the stipulator, has remitted a money debt by means of an acceptilatio; an action lies against him for the sum which he has thus remitted.

(i) In regard to the second chapter of the Aquilian law, Ulpianus says, "Hujus legis secundum quidem capitulum in desuetudinem abiit." 1. 27. s. 4. Dig. ad leg. Aquil. (9. 2.) To which Justinian added "Caput secundum legis Aquiliæ in usu non est." Instit. s. 12. de lex. Aquil. (4. 3.) There has been much interesting discussion in regard to the contents of the second chapter of the Aquilian law. Gans says that among the numerous investigations of this subject, Hasse,² in his work on "Culpa," has proved that it did not treat of a *damnum injuria datum* on a *thing* (*res*), nor merely relate to heterogeneous matter: but that whilst the second chapter treated of *dolus in fraudem stipulatoris*, the other chapters embraced every species of *culpa*. Hasse on "Culpa," 79-83. Gans Schol. zum Gaius, pp. 443, 444. Huschke, after the lapse of more than thirty years since Gans wrote, has discussed the question very carefully and acutely in his "Kritik." He thinks that Aquilius, starting from the law of the Twelve Tables in relation to *injuria* (*Rupitias qui injuria faxit . . . sarcito*), and the development of the ancient law by means of subsequent legislation; aimed at the accomplishment of a comprehensive legal reform in relation to "*damnum injuria datum*" in general: and that his legislation was distinguished from the previous law upon the subject in the following respects. That whilst the former law took cognisance of external and sensible damage done by means of bodily injury only (*rupitia*), the new law starting from an ideal stand-point embraced the illegal invasion or destruction of rights of property in all respects (*damnum factum*). That as nearly at the same time the lex Furia extended the notion of the Twelve Tables in

relation to prescription to guaranty or security; so by the *lex Aquilia* the distinction between grave and less serious injuries, as also of material ones was determined, and a stricter mode of procedure introduced. Huschke contends that this view does not rest upon mere conjecture, as Rudorff seemed to think, but on the unexceptionable testimony of Ulpianus himself, who says, "*Lex Aquilia omnibus legibus, quæ ante se de damno injuria locatæ sunt, derogavit, sive duodecim tabulis, sive alia quæ fuit: quas leges nunc referre non est necesse.*" l. 1. pr. Dig. ad leg. Aquil. (9. 2).

In accordance with the preceding views, the *lex Aquilia* determined, in the first place, the distinction between specified grave injuries, and others that were indefinite and partial or trivial. Under the class of grave injuries, were included injuries which related partly to things corporal and partly to things incorporeal. Among those things termed corporal, which formed the basis of Roman property at the time of the passing of the *lex*, were slaves and cattle; among incorporeal things were obligations; not servitudes nor inheritances, which are not to be considered as within the purview of this law. The case of the adstipulator treated in the second chapter, stands in immediate connexion with obligations. According to the statement of Theophilus, the law was passed at the end of the fourth century of the State, at the time of the "*secessio plebis.*" Kritik, pp., 107—114.

216. Quæ et ipsa parte legis damni nomine actionem introduci manifestum est. Sed id caveri non fuit necessarium, cum actio mandati ad eam rem sufficeret; nisi quod ea lege adversus infitiantem in duplum agitur.

216. It is also certain that this action has been introduced in that very part of the law under the appellation of damage. But this precaution was unnecessary, since the "*actio mandati*" sufficed for the purpose; unless that, by virtue of that law, an action was instituted for the double (*in duplum*) against the party denying his liability.

217. Capite tertio de omni cetero damno cavetur. Itaque si quis servum vel eam quadrupedem quæ pecudum numero est vulneraverit, sive eam quadrupedem quæ pecudum numero non est, velut canem, aut feram bestiam velut ursum leonem vulneraverit vel occiderit, ex hoc capite actio constituitur. In ceteris quoque animalibus, item in omnibus rebus quæ anima carent, damnum injuria datum hac parte vindicatur. Si quid enim ustum aut ruptum aut fractum fuerit, actio hoc capite constituitur; quamquam potuerit sola rupti appellatio in omnes istas causas sufficere: ruptum enim intellegitur quod quoquo modo corruptum est. Unde non solum usta aut rupta aut fracta, sed etiam scissa et collisa et effusa et diruta aut perempta atque deteriora facta hoc verbo continentur. (j)

217. The third chapter treats of every other kind of damage. If therefore any one has wounded a slave or a quadruped belonging to the class called cattle (*pecudes*), or has wounded or killed a quadruped not belonging to that class, as a dog, or a wild beast, a bear or a lion, an action lies by virtue of this chapter. Also "damnum injuria datum" upon other animals, as well as upon things that have no life, are punished by this part of the statute. For if anything has been burnt, or destroyed, or broken, an action is given under this head of the law; although the appeal for simple destruction (*sola rupti*) would suffice for all these cases; for by the term "ruptum" is to be understood that which has been destroyed in any manner. Hence this word comprises not only that which is burnt, or destroyed, or broken, but also that which is torn, and crushed, and spilled, and demolished, or in any other manner utterly deteriorated and destroyed.

(j) We are also indebted to Ulpianus for the contents of the third chapter of the Aquilian law. He says, "Tertii autem capite ait eadem lex Aquilia: Ceterarum rerum, præter hominem et pecudem occisos, si quis alteri damnum facit, quod usserit, fregerit, ruperit injuria, quanti ea res in diebus triginta proximis, tantum æs domino dare damnas esto." 1. 5. Dig. ad leg. Aquil. (9. 2.)

218. Hoc tamen capite non quanti in eo anno, sed quanti in diebus xxx proximis ea res fuerit, damnatur is qui damnum dederit; ac ne PLURIMI quidem verbum adicitur: et adeo quidam diversæ scholæ auctores putaverunt liberum esse jus datum, ut dumtaxat de xxx diebus proximis

218. However, in this chapter, he who is chargeable for the damage, is condemned not for the value of the thing in the previous year, but for its value during the last thirty days; and the expression "the highest value" (*plurimi*) is not employed: hence certain doctors of the opposite

vel eum *Prætor formulæ* adiceret quo plurimi res fuit, vel alium quo minoris fuit. Sed Sabino placuit perinde habendum ac si etiam hac parte *PLURIMI* verbum adjectum esset: nam legis latorem contentum fuisse, quod prima parte eo verbo usus esset.

school have thought, that the judge was only at liberty to choose out of the last thirty days, either if the *Prætor* had added to the formula "in which the thing had attained its greatest value," or otherwise, "in which it was worth least." But according to the view of *Sabinus*, it is to be taken as if also in this part of the law the expression "the highest value" (*plurimi*) had been added: for the proposer of the law was satisfied, since he had employed that word in the first chapter of the law.

219. Et placuit ita demum ex ista lege actionem esse, si quis corpore suo damnum dederit. Itaque (*k*) alio modo damno dato utiles actione dantur: velut si quis alienum hominem aut pecudem incluserit et fame necaverit, aut jumentum tam vehementur egerit, ut rumperetur; aut si quis alieno servo persuaserit, ut in arborem ascenderit vel in puteum descenderet, et is ascendendo aut descendendo ceciderit, et aut mortuus fuerit aut aliqua parte corporis læsus sit. Item si quis alienum servum de ponte aut ripa in flumen projecerit et is suffocatus fuerit, tum hic corpore suo damnum dedisse eo quod projece- rit, non difficiliter intellegi potest.

219. And thus at length an action was given by this law, if anyone by his own bodily act (*corpore suo*) had caused damage. Since on account of injury inflicted in any other way analogous actions (*utiles actiones*) are given: for example, if anyone has confined another man's slave, or his cattle, and has allowed them to perish with hunger, or has driven his beast so hard that he has destroyed it, or if anyone has persuaded another's slave to ascend a tree, or to descend into a well, and the slave in the ascent or the descent has fallen, and has either been killed or injured in some part of his body. Again, if anyone has thrown another man's slave from a bridge, or from the bank, into the river, and he has been drowned, it is not difficult to be understood that such a one by his own bodily act has occasioned the damage in consequence of his pushing the slave in.

(*k*) *Itaque* is a reading taken from the conjecture of Huschke. Heffter reads *quia*, and Goschen has the old reading *atqui*. The MS. after the word "dederit" has

simply the letter "q," and Huschke conjectures that the "it" of the previous word by what he terms "gemmination," gives the reading adopted in the text. In the sentence toward the close of the section "*item si quis, etc.*" Huschke proposes to read "quod" instead of "item." There is no "item" in the MS., but the letter "p" erroneously written for "q," which stands for *quod*. The "t" from which *item* has been conjectured is from the "t" in the word *sit*, which immediately precedes. Kritik. 115.

DE INJURIIS.

220. Injuria autem committitur non solum cum quis pugno pulsatus aut fuste percussus vel etiam verberatus erit, sed et si cui convicium factum fuerit, sive quis bona alicujus quasi debitoris sciens cum nihil debere sibi proscripserit, sive quis ad infamiam alicujus libellum aut carmen scripserit, sive quis matrem-familias aut prætectatum (l) adsectatus fuerit, et denique aliis pluribus modis.

OF INJURY.

220. Now injury is not only committed when anyone is struck with the fist, or beaten with a stick, or even scourged, but also if anyone has publicly outraged a person, or if anyone has sold by auction the property of another as if he were his debtor, although he knew that he was owing him nothing: or again, if anyone has written a libel or composed an infamous song against a person, or if any one silently and constantly follows after a Roman matron (*mater-familias*), or a young man who is a minor, (*prætectatum*): and so in short in many other ways.

(l) *Prætectatus*. One clothed with the "toga prætecta," which was the sign that the wearer was an *impubes*. The term was employed in opposition to the so-called *vesticeps*, which was the name applied to one who had attained the age of puberty, and had donned the "toga virilis." Until a Roman youth assumed the latter garment, he wore the "toga prætecta," with its broad purple hem, which distinguished him from other persons. Ulpianus gives an account of the Roman vestments. He says "Vestimenta omnia aut virilia sunt, aut puerilia, aut muliebria, aut communia, aut familiarica." And then, after describing the "virilia," he

adds "Puerilia sunt, quæ ad nullum alium usum pertinent nisi puerilem, veluti togæ prætextæ, etc." 1. 23. s. 2. tit. auro, argent, etc. (34. 2.) Again, Ulpianus says "Proxime ætatem prætextati accedere eum dicimus, qui puberem ætatem nunc ingressus est." 1. 3. s. 6. de lib. exhib. (43. 30.) Instit. s. 1. de injur. (4. 4.) See Festus sub vocib. "Vesticeps," and Gellius, 5. 19. Also Art. "Impubes," Smith's Dict. Gr. et Rom. Antiq.

221. *Pati autem injuriam videmur non solum per nosmet ipsos, sed etiam per liberos nostros quos in potestate habemus; item per uxores nostras quamvis in manu non sint. Itaque si veluti filiæ meæ quæ Titio nupta est injuriam feceris, non solum filiæ nomine tecum agi injuriarum potest, verum etiam meo quoque et Titii nomine.*

221. Now we appear to suffer injury not only in our own person, but also in the persons of our children whom we have under the *potestas*: and in the persons of our wives, although they may not be in our *manus*. Therefore, if you have inflicted an injury on my daughter who is married to Titius, the action may be instituted against you, not only in the name of my daughter, but also in my name, and in that of Titius.

222. *Servo autem ipsi quidem nulla injuria intellegitur fieri, sed domino per eum fieri videtur: non tamen iisdem modis quibus etiam per liberos nostros vel uxores, injuriam pati videmur, sed ita, cum quid atrocius commissum fuerit, quod aperte in contumeliam domini fieri videtur, velut si quis alienum servum verberaverit; et in hunc casum formula proponitur. At si qui servo convicium fecerit vel pugno eum percusserit, non proponitur ulla formula, nec temere petenti datur. (m)*

222. But on the slave himself no injury seems to be inflicted, for it was regarded as done to the master through him; yet in this case we do not seem to suffer an injury in the same manner as in the persons of our children or our wives; but then only, when something more shameful has been done, which appears manifestly to be intended as an insult to the master of the slave, for example, if any one has scourged another person's slave, and in this case a mode of procedure (*formula*) is provided. But if on the other hand anyone has merely outraged a slave, or has smitten him with the fist, no mode of procedure (*formula*) is provided, and one is not obtained by any one seeking it without good reason.

(m) Paulus gives the following definition of injury : "Generaliter," says he, "dicitur injuria omne quod non jure fit. Specialiter alias contumelia, quam Græci ἀδικίαν (*wrong*) vocant: nam cum Prætor non jure adversus nos pronuntiat, injuriam nos accepisse dicimus. Unde apparet non esse verum quod Labeo putabat, apud Prætorem injuriam ὕβριν (*insult, outrage*) duntaxet significare. Commune omnibus injuriis est, quod semper adversus bonus mores fit, id quod non fieri alicujus interest. Hoc edictum ad eam injuriam pertinet, quæ contumeliæ causa fit. Fit autem injuria vel in corpore, dum cædimur: vel in auribus, dum convitium patimur; vel cum dignitas læditur, ut cum matronæ vel prætextato comites abducuntur." Mos. et Rom. legum collat. ii. 5. 1—4, See also Paulus Recep. Sent. v. 4. Ulp. l. 1. pr. sec. 1. 2. Dig. de inj. (47. 10) and for the words of the edict, l. 7. ss. 2. 25. 34 l. 17. s. 10. Dig. tit. cit. (47. 10) Gaius ii. 78 et sec.

223. Pœna autem injuriarum ex lege xii tabularum propter membrum quidem ruptum talio erat; propter os vero fractum aut collisum trecentorum assium pœna erat *statuta*, si libero os fractam erat; at si servo, CL propter ceteras vero injurias xxv assium pœna erat constituta. Et videbantur illis temporibus in magna paupertate satis idoneæ istæ pecuniæ pœnæ esse. (n)

223. But the punishment for injury according to the law of the Twelve Tables, for a member destroyed was the "talion" (a limb for a limb), i.e.: for a bone broken or crushed, the penalty was fixed at three hundred Asses if it were the bone of a free-man, but one hundred and fifty Asses if it were that of a slave. On the other hand the penalty for other injuries was placed at twenty-five Asses. On account of the great poverty in those times, these pecuniary penalties seem to have been quite sufficient.

(n) Ulpianus says, "Injuriam si quidem atrox, id est gravis non sit, non sive judicis arbitrio æstimat actor. Atrociem autem æstimare solet Prætor; atque colliget id ex facto, ut puta si verberatus, vel vulneratus quis fuerit." Mos et Rom. legum Col. ii. 2. 2. "Si quis membrum rupit, aut os fregit, talione proximus agnatus ulciscitur." Cato Orig.

apud Pris. vi. p. 710. Paulus says, "Injuriarum actio aut legitima est, aut honoraria. Legitima ex lege duodecim tabularum. 'Qui injuriam alteri faxit quinque et viginti pœno urito.' Quæ lex generalis fuit; fuerunt et speciales, velut illa: 'Manu, fusti si os fregit, libero CCC, servo CL pœna sunt.'" Mos. et Rom. legum Collat. ii. 5. 5. Injuries were inflicted on the body by blows, on the ears by shameful language, and on the life of anyone by some turpitude or dishonour. "Injuriae sunt, quæ aut pulsatione corpus, aut convicio aures, aut aliqua turpitudine vitam alicujus violent." Auct. ad Her. 4. 25.

224. Sed nunc alio jure utimur. Permittitur enim nobis a Prætorē *ipsis* injuriam æstimare; et judex vel tanti condemnat quanti nos æstimaverimus, vel minoris, prout illi visum fuerit. Sed cum atrocem injuriam Prætor æstimare soleat, si simul constituerit quantæ pecuniæ nomine fieri debeat vadimonium hac ipsa quantitate taxamus formulam et judex *quamvis* possit vel minoris damnare, plerumque tamen propter ipsius Prætoris auctoritatem non audet minuire condemnationem. (o)

224. But we employ now a different rule of law; for the prætor permits us to estimate the amount of injury, and the judge condemns the offender to pay what we have estimated, or less, according to his judgment; but as the prætor determines if the injury is very great, so at the same time is it fixed for what amount the "vadimonium" must be given; we ought to estimate our demand according to this determination, and although the judge can condemn to a sum less than the estimation, yet generally on account of the authority of the prætor, he does not venture to diminish that amount.

(c) After the passing of the *lex Ælia Sentia* the judges were classified as follows; *Judices*, strictly so called, and *Recuperatores*. The latter were appointed in actions for injury; in the case of the "*interdictum de vi armata*;" the "*actio vi bonorum raptorum*," and in the case of *vadimonium*. When the promise to appear before the tribunal had been made, the party was threatened with *Recuperatores* to condemn him if he failed in his promise, in actions relating to *Status*, and in several other cases. See Puchta's *Instit.* ii. 57

225. Atrox autem injuria æstima-
tur vel ex facto, velut si quis ab ali-
quo vulneratus aut verberatus fusti-
busve cæsus fuerit; vel ex loco,
velut si cui in theatro aut in foro
injuria facta sit; vel ex persona,
velut si magistratus injuriam passus
fuerit, vel senatoribus ab humili per-
sona facta sit injuria. (p) (q)

225. But an injury is considered as
severe from the nature of the act;
for example, if a person has been
wounded by any one, or scourged or
beaten to death with rods: or accord-
ing to the place, as for instance if an
injury is done to any one in the
theatre or in the forum; or according
to the person, as if a magistrate shall
have suffered an injury, or an injury
be done to a senator, by a person
in a low station of life.

(p) The prætor substituted for certain penalties a pecuniary satisfaction estimated by the judge, who in making his award took into consideration the position and quality of the complainant, and also of the party charged with the offence, and likewise the gravity of the injury which had been inflicted. The prosecutor had his choice between a criminal prosecution and a civil action; but he was not permitted to avail himself of both. Justinian says, "In summa sciendum est. de omni injuria eum qui passus est, posse vel criminaliter agere vel civiliter." Instit. s. 10. de injur. (4. 4.) An action for injury was extinguished either by pardon or by delay (*mora*). The injury was considered as forgotten after the space of one year. The action did not pass to the heirs of the person injured, unless before his decease the action had been prosecuted through the preliminary stages to the "litis contestatio." Diocletianus in a constitution said: "Si autem in rixa, inconsulto calore prolapsus, homicidii convicium objecisti, et ex eo die annus excessit, quum injuriarum actio annuo tempore præscripta sit, ob injuriæ admissum conveniri non potest." 1. 5. Cod. de injur. (9. 35.) 17. Dig. de injur. et famos. libel. (47. 10.)

(q) Huschke thinks that it is probable that all the enactments contained in the Twelve Tables in relation to injury have been preserved, and that at any rate the fragments contain a complete system upon the subject of injury.

The Decemvirs distinguished—1st, Injuries which touched the honour or the personal status of any one: such as “*occettare sive carmen condere, quod infamiam faceret flagitiumve alteri.*” Under this head would be included all that was calculated to affect a man publicly, whether uttered by word of mouth, or published in a writing. In accordance with the principle of the “Talion,” the punishment was most severe, for it appears to have been capital. The man who was rash enough to smite with words (*verbis verberare*) was in his turn beaten to death with rods (*fustibus ferire*). Although such cruel punishment might satisfy revenge, it was more usual to proceed against the wrong-doer by means of the *legis actio privata*; in which, case the penalty resembled that for a “*furtum manifestum.*” Still, it sometimes happened that *judicia privata* and *publica* did not vary very much in the punishment awarded for the particular offence. 2nd. The remaining injuries recognised under the ancient law, were divided into severe and slight injuries. Of severe injuries there were two kinds: The destruction of an entire bodily member; “*Si membrum rupit, ni cum eo pacit, talio esto.*” Fest. v. Talionis. Gell. 20. 1; and the breaking or fracturing of a bone without destroying it, that is to say, without the severing or laming of the member. All other injuries not included in the above categories were grouped in a single class by the laws of the Twelve Tables, and to this class was applied the term *injuria*, which at a later period came to denote not simply a class, but the genus itself. Such injuries were atoned for by a pecuniary penalty. Cic. de Repub. 4. 10. Tusc. 4. 2. Arnob. 4. 34. Horat. Sat. 2. 1. v. 80—86. Epist. 2. 1. v. 152. Cornut. ad Pers. 1. 137. Fest. sub voce “*Occentassint.*” Paulus Recep. Sent. 5. 4. The provisions of the Twelve Tables in relation to injuries sufficed for the the people of Rome till the period of the sixth century from the foundation of the city, when the entirely altered condition of things made a change absolutely indispensable. At the commencement of that century, the *As* was reduced

to one-sixth of its original value, and soon afterwards to the one-twelfth of its former weight; added to which the growing wealth of the State made it easy for an unprincipled man with a purse full of money, to commit offences with comparative impunity. The remedy for this state of things was soon found in the Edicts of the Prætors, most of which were promulgated before the end of the Republic. The Prætors took notice of injuries in general, and also of certain special kinds of injuries. Not only did they give the “*actio injuriarum*,” but they also employed equitable principles probably by introducing into the formula the expression “*ex bono et æquo*.” The construction of the formula followed as closely as possible in the track of the “*legis actio*.” The special matter of fact was set forth, as for example: “*Quod tu mihi membrum rupisti, os fregisti, etc.*” “*Quod Auli Agerii pugno mala percussa est.*” Gai. iv. 60. The injuries of a special character, for the punishment of which the Prætor promised to give relief were, 1st, If any one “*adversus bonos mores convicium cui fecisse dicatur*.” 2nd, If by certain conduct any wrong were done to the honour of a virtuous person as *comitem abducere*, *appellare*, or *assectari contra bonos mores*. 3rd, “*Nequid infamandi causa fiat; si quis adversus ea fecerit, prout quæque res erit, animadvertam*.” These edicts came in the place of the provisions of the Twelve Tables already referred to, “*Occentare sive carmen condere, quod infamiam faceret flagitiumve alteri*,” and in the place of the “*Os fractum vel collisum*” of a slave, the prætor gave the action for “*Verberatio contra bonos mores*.”

The action given by the Prætor for “*injuria*” was without doubt an equitable action, as such words as the following shew: “*Quantum tibi æquum or bonum et æquum esse videbitur, tantam pecuniam. . . . condemna*.” Also l. 17. s. 2. Dig. de inj. (47.10.) Huschke thinks that the Prætor, in view of the distinction between grave and slight injuries, had probably introduced some such words as the following into his Edict: “*Si atrox esse injuria videbitur, quantæ pe-*

cuniæ nomine vadimonium fieri debeat, ipse constituam." See Gai. iii. 224. The Prætor thus indicating that certain injuries were to be visited with a severer penalty than the judge might otherwise feel himself at liberty to impose, if he had only taken into consideration the estimation of the plaintiff himself. At the time of the "legis actiones" both the plaintiff and the defendant were placed under restraint to prevent frivolous litigation (*Pœna temere litigantium*). At a subsequent period a severer penalty seems to have been introduced by the prætor, and the "injuriarum depectus" or "damnatus" was punishable with "infamia." Cic. Ver. ii. 2. 8. If the defendant were absolved from the charge, he had an action against the plaintiff for a tenth part of the amount of the process. Valer. Max. viii. 2. s. 3. In consequence of the risk of an adverse judgment, the prætor did not allow the action for injury to be employed against a "patronus," or by children against their parents; unless indeed after "causa cognita" on account of shameful wrong (*atrox injuria*). Gai. iv. 177. It seems probable that the lex Cornelia had only the effect of introducing a new remedy when an injury had been committed, giving the plaintiff his choice to proceed by the prætorian action, or under the lex, as he might think best. Cicero mentions an "injuriarum actio," with a formula given by the Prætor for the loss of a hand, a kind of injury which certainly fell under the provisions of the lex Cornelia. Cic. de Invent. (2. 20.)

The notion of "injuria" itself must very much depend upon the ideas and the life of a people. When one comes to understand that at Rome, to be held in honour, was not merely to enjoy a good report among the members of the same State, but that it implied a certain valid dignity, which belonged legally to the Roman as a free man and a citizen, we may easily understand that an injury to the fair fame of a person, carrying painful legal consequences, would come to be punished as a "violata existimatio." It was indeed a blow aimed at Liberty. 1. 1. ss. 4. 6. Dig. de inj. (47. 10). Thus Cicero says: "Actio enim injuriarum non jus posses-

sionis assequitur, sed dolorem imminutæ libertatis judicio pœnaque mitigat." Pro. Cæc. 12. fin. In order however to constitute injury in the legal sense, two things would seem to have been requisite. There must be an "actual" attack upon the person of another, and the attack must be made "illegally." The early laws of the Twelve Tables in the case of severe injury, "os fractum vel collisum," regarded even slaves as possessed of a certain legal "persona." The mere intention however, to do wrong to another did not constitute injury: "Nec potest quisquam injuriam accipere sine aliquo detrimento vel dignitatis vel corporis vel rerum extra nos positarum." Seneca de Cons. 5. Rom. et. Mos. coll. 2. 5. s. 4. Recep. Sent. 5. 4. s. 1.

For a remarkably full and able discussion of this subject, see Huschke's *Kritik*, pp. 118—164. Horace seems to have written from life in the following lines:

"Sed tamen ut monitus caveas, ne forte negoti
Incutiat tibi quid sanctarum inscitia legum:
Si mala condiderit in quem quis carmina, jus est
Judiciumque.—Esto, si quis mala; sed bona si quis
Judice condiderit laudatus Cæsare? si quis
Opprobriis dignum laceraverit, integer ipse?—
Solventur tabulæ risu, tu missus abibis." Sat. 2. 1. v. 80.

COMMENTARY THE FOURTH.

DE ACTIONIBUS.

1. *Si quæritur*, quot genera actionum sint, verius videtur duo esse: in rem et in personam. Nam qui iiii esse dixerunt ex sponsionum generibus, non animadverterunt quasdam species actionum inter genera se rettulisse. (a)

OF ACTIONS.

1. It now remains to speak of actions. If one enquires how many kinds of actions there are, speaking more correctly there appear to be two—real actions (*in rem*) and personal actions (*in personam*). For those who have said there are four kinds according to the different kind of *sponsio* have not observed that certain species of actions are included in the kinds that we have mentioned.

(a) The Fourth Book of the Commentaries of Gaius has thrown a flood of light upon Roman Civil Process. This Book may be said to contain three principal divisions: I. Of Actions; II. Of Pleas (*Exceptiones*); and III. Of the Interdict. In the concluding part of the book we have some additional matters which Justinian has placed under the rubric “De pœna temere litigantium.”

A legal claim arises when one person is indebted to another, and such a claim is called an Obligation. Again, when any person has the exclusive Right to a thing, so that no one dare violate that right, he is said to have an absolutely real Right. There is no *legal* Right, it should be remembered, except by the legitimate authority of the State. When there is an invasion of Right, relief may be afforded to

the injured party in two ways, either by the act of the party himself, which the Germans call "self-help;" or aid may be afforded by means of the power of the State. In the infancy of society the invariable rule has been for the subject of a Right to protect it by his own power and exertion. When society is more perfectly organized, as in our time, the problem for solution is to limit as far as possible the aid which a man's "self-help" affords for the protection of his Right. The assistance and protection which the State gives to a private Right is rendered by means of the *actio*, which is simply a transaction by virtue of which a violated Right is protected or repaired. No private Right is perfect and entire unless it be defended by an action. The claim which a man has to the protection which the State affords to his person and property is denominated his Right of action. The so-called "*Actiones in personam*" correspond to Rights of persons. Rights *in rem*, on the other hand, give rise to the so-called "Real Actions." Personal Actions are those which may be brought against certain individuals, whilst "*Actiones in rem*" can be brought against any person who violates a real Right, as a Right of property (*dominium*).

The fundamental *causa* or ground of the action, as, for example, in the case of property, is the *dominium* itself: whilst the circumstance which entitles me to the use of the action is the violation of my Right. It is to be observed that a Right which cannot be enforced is a contradiction in terms. In the *legal* idea of Right there is always implied the possibility of the employment of force. We sometimes speak of a person having a Right to the gratitude or to the esteem of another; but in such cases there is no Right in the legal acceptance of the term. Every man legally entitled may enjoy the full benefit of his Right, even though it afford him the least possible advantage, and though it be productive of the greatest inconvenience and disadvantage to another. The maxims that avail in such a case are—"Fiat justitia peccat mundus," and "Qui suo jure utitur neminem lædet," or "Nullus videtur dolum facere, qui suo jure utitur;" that is to

say, a party is not answerable for the consequences that may follow from the fullest, freest and largest exercise of his Right. But there is a modification of this comprehensive principle on the ground of equity, when it can be proved that a party is using his Right merely with the view and indeed for the purpose of inflicting injury upon another. Von Vangerow's Pand. vol. i. pp. 624, 625. l. 1. s. 12. l. 2. s. 9. Dig. de aqua etc. (39. 3.) Nov. 63. l. 3. p. Dig. de oper. pub. (50. 10.) Instit. Roman Law, part ii. sec. 25. l. 37. Dig. de obl. et act. (44. 7.) Gai. iv. 2, 3. s. 1. Inst. de actione. (4. 6.) Gai. i. secs. 8. 12. Inst. de jure natur. (1. 2.)

Legal enactments, in whatever way they may originate, give rise to actions:—the “*jus quod ad actiones pertinet.*” Among the different modes by which Rights might be protected may be mentioned Actions, Interdicts, Extraordinary Process, and Cautio or Security. Gaius, and Justinian who has adopted his method, it will be observed, have treated Rights and the Actio under one and the same head.

The History of Roman Civil process is divided into two periods. The first or classical period extending to the reign of the Emperor Diocletian. The second, till that of Justinian. In the first period the process was *ordinary* and *extraordinary*. In Civil process there were two parties—an accuser, called the “actor;” and an accused, denominated the “reus.” The tribunal had to decide whether the “actor” was right or wrong in his charge. Every process involved a strife, and the object aimed at was to do justice between the litigant parties. The controversy was over *facta*, or questions of *law*, or both. It was the duty of the tribunal to which the parties at variance appealed to ascertain which of them was legally entitled, and the result of this decision was required to be pronounced in the *sentence*. The sentence of the tribunal was not always final, as, under certain circumstances, the parties might *appeal* to another tribunal. When the accuser failed, the process was at an end; when he succeeded, the sentence was followed by execution, unless the “reus” or defendant chose to appeal from the decision

given. The first part of the process, until the sentence, was divided into two principal parts. First, the Instruction; and second, the Proof. The plaintiff was required to submit his claim to the proper authority. The proof was required to show the truth or the falsehood of the accusation, in order to convince the judge. It was the duty of the judge formally to decide upon the truth or the falsehood of the accusation. The *extraordinary* process was marked by this peculiarity: that the entire process from its commencement to its close was carried on before the same tribunal. To use the technical expressions employed, the same person had cognizance *in jure* and *in judicio*. In the ordinary process the early proceedings in the suit were before the magistrate, as the Prætor, and were then said to be *in jure*. The proof was given before the Judices or Recuperatores, or Arbitri, or other officers appointed for a similar purpose. The judices or the officers who exercised a similar function, pronounced the final sentence. Ordinarily, however, the prætor and the judices were distinct. In this "Ordo judicium privatorum" the instruction for the process was confined to the magistrate. The "munus judicandi," or, as it is expressed, the "officium judicium," belonged to a distinct officer, presiding in his own court, called the judex. This division of duties was a guarantee for impartiality in the conduct of the suit. There is a striking resemblance between the "judices" and the English jury. In regard to the magistrates, there were three classes: those for the city of Rome, those for the Italian states, and those for the Provinces. In ancient Rome the king alone was chief magistrate; he was the *custos orbis*. The Perduelliones and the Questores parricidii had especially to do with criminal law. The second period in Roman civil process was when the "imperium" was executed by the "Magistratus majores." The "Magistratus minores" had no "imperium." Of the higher magistrates, after the Kings came the Consules, both of whom were qualified by the "imperium" for the administration of justice. In the year 387 of the State, the duties

of the consules devolved upon a special officer named the *Prætor urbanus*, whose duty it was to protect the civil rights of citizens only. More than a hundred years afterwards, *A. U. C.* 507, in consequence of the increasing intercourse of Rome with foreign nations, a second *Prætor* was appointed, who was called the *Prætor peregrinus*. His duty as a judge was to settle disputes between citizens and foreigners, or to administer justice when the litigants were both *peregrini*. The *Prætor urbanus* did not sit merely in the senate, but he was the ordinary representative of the Consules for the transaction of municipal affairs. *Cic. ad Fam.* 10. 12. 3. *Ver.* i. 50. Thus, in Rome there were the two *Prætors*—the *Prætor urbanus*, “*qui inter cives jus dicit*,” and the *Prætor peregrinus*, “*qui inter cives et peregrinos jus dicit*.” In addition to the *Prætors* there were other inferior magistrates, the *Ædiles*, who exercised a special jurisdiction in matters relating to markets, and to what we should now denominate as police. The *curule Ædiles* were distinguished from those denominated *plebeian* only by the superior dignity of their office. The *Ædiles* had also charge of the festal games, some of which could only be celebrated under the superintendence of one class of *Ædiles*, some under the other, whilst some of the games were under the care and supervision of both. After the first Punic war, these games were celebrated usually at the expense of the *Ædiles*. *Cic. de leg.* iii. 3. in *Verr.* v. 14 *Dio Cass.* 43. 48. The *Censors* had only a limited jurisdiction, and one quite different from that of the Consuls and the *Prætors*. They had nothing to do with war nor with the external affairs of the State; but their duties related to the proper administration of the domestic affairs of the nation. They could summon *Comitia* for the purpose of introducing new laws, and it was especially their duty to take charge of the quinquennial census. Without minutely entering into an enumeration of the officers appointed for the administration of justice, it may be mentioned that in the provinces there were *Præsides* with the *Quæstores*

possessing a special jurisdiction similar to that exercised by the *Ædiles* in the Imperial city. In the Italian States, were the *Duumviri*, the *Quatuorviri*, the *Ædiles*, and the *Proconsuls* or the *Proprætors*. The latter seemed to unite in themselves offices which in Rome were discharged by distinct magistrates.

In the times of the Emperors there arose in the magistracy at Rome what has been denominated a “dualismus.” Although the spirit of liberty languished, it was not extinct. The remembrance of the prosperity enjoyed in the times of the Republic, if it did not rescue the substance of freedom, at least compelled the tyrants of the empire to permit the names and forms under which Rome had grown powerful and great to continue. There were two kinds of magistrates in the State—imperial and republican magistrates. The emperor himself and his officers constituted one class, including the *Præfectus urbi*, the *Triumviri*, for the choice of senators and for the enrolment of the knights, the *Præfectus prætoria*, and the *Præfectus annona*. Such were the imperial officers. Of the magistrates of the republic it may be said in a single sentence that they were allowed to continue in the outward enjoyment of their former dignities; but their prerogatives were extinct, for they were usurped by the creatures of their imperial rulers.

Thus, in order to the clear apprehension of the civil process of the Roman empire, we must distinguish between Rome, the Provinces, and Italy. In the ancient times of Rome the process was commenced before the king, the consuls and the prætors; in the times of the emperors we have seen that the emperor chose his own servants, and that the republican magistrates enjoyed the empty name of office, without the honours and the power that belonged to them in the flourishing days of the republic.

In the Italian states and colonies the jurisdiction of the præsides originally included the commencement of civil proceedings; but towards the close of the republic the competency of these municipal magistrates was essentially

limited, so that certain legal proceedings could no longer be commenced before these officers of the State. In the provinces, the jurisdiction, even in the times of the republic, was in the hands of the provincial regents; and in later times the administration of justice was entrusted to the proconsuls and the proprætors. In the times of the emperors there were, in the imperial provinces, the "legati Cæsaris," or the "præsides," who had a special jurisdiction in matters relating to the revenue. In the republican provinces there were the quæstors—judges originally chosen by the Roman people. The *jus Italicum* did not, as has been erroneously supposed, imply or confer an independent jurisdiction; but only granted the right to the exercise of certain privileges in relation to taxes, usucapion, and other matters.

In regard to the term jurisdiction, it originally implied simply the right to give authorised legal utterance—*juris dicentes*, "jus dicere," "do," "dico," "addico," or competence for the discharge of the functions of ordinary process, not of the *cognitio extraordinaria*. That is to say, the officer of the State who had obtained a *jurisdictio*, pronounced that which was right and proper to be done in the case which was brought in the manner legally recognised under his notice. This was a part of his "imperium." Ulpianus says, "*jurisdictio est etiam judicis dandi licentia*." l. 3. Dig. de juris. (2. 1.) In a stricter sense the term "*jurisdictio*" was confined to the discharge of the duties which devolved upon the officer by virtue of the "*ordo judiciorum privatorum*." It belonged to all the chief magistrates charged with the administration of justice, so far as they were legally empowered for their office. The essential "*imperium*," however, only belonged to the highest magistrates. Thus, a distinction was made between the "*imperium mixtum*" and the "*imperium merum*." The latter gave the magistrate the power of the sword, and it was always conferred by law; the "*imperium mixtum*" was that power which gave validity to the "*jurisdictio*." There could be

no "jurisdictio" without an "imperium." Ulpianus says, "Imperium aut merum est, aut mixtum est. Merum est imperium, habere *gladii potestatem* ad animadvertendum facinorosos homines, quod etiam potestas appellatur. Mixtum est imperium, cui etiam jurisdictio in est, quod in danda bonorum possessione consistit." l. 3. Dig. de juris. (l. 3.) That which constituted a marked peculiarity of the "imperium mixtum" was the following: the magistrate possessing it, could at times delegate to another person the exercise of his power. But the special duties, as, for instance, those of the Prætor, which resulted from the "imperium merum"—the "*gladii potestatem*"—he could delegate to no one. The Roman prætor possessed, in connexion with the "jurisdictio" and with his "imperium mixtum," a certain authority which did not appertain to him as a magistrate, either by virtue of his "imperium" or his "jurisdictio," but which originated either in a *lex*, or in a *senatus-consultum*, or in a *constitutio principis*. This authority enabled the Prætor to appoint a tutor, to empower a pupillus, to sell land, and to act in matters relating to alimony. Keller's Civ. Proc. p. 9.

In regard to the "*officium judicis*," or, as it is termed, the "*judicandi munus*." The judiciary consisted partly of a college of distinguished judges and partly of private persons. In relation to the first class, there is a good deal of obscurity, but we know that the pontifices, the decemviri, and the centumviri, had the power of deciding suits. (Decemviri litibus judicandis.) Pomponius says, "*Omnium tamen harum, et actiones apud collegium pontificum erant, etc.*" l. 2. s. 6. Dig. de orig. jur. (l. 2.) The competence of the pontifical college, as the guardians of right, did not merely extend to matters relating to the religion of the State, but to all questions of civil right which might be brought into combination with sacred things, or viewed from a religious aspect. The power and activity of the pontifices, it is probable, did not last more than a century after the period of the enactment of the laws of the Twelve Tables. Whether there was any distinction at this early period

between *jus* and *judicium* seems very uncertain and difficult to decide. We find the decemviri, the "ten men," acting as judges in the year 305 A.U.C. In the time of Cicero and the Emperor Augustus, they were judges in cases of freedom. Puchta thought that they were men selected from the senate. It is more probable that they were minor magistrates, and that they were chosen from the *comitia tributa*. It is also uncertain whether they constituted a distinct court, or whether they were united with the centumviri. From the commencement of the sixth century of the State, they were constituted, according to Pomponius, as judges at Rome. "Deinde quum esset necessarium magistratus, qui hastæ præset, decemviri in litibus judicandis sunt constitui." l. 2. s. 29. Dig. de orig. jur. (l. 2.) Gell. Noc. Attic. xiii. 14. Thus the decemviri were originally a judicial tribunal; then they seem to have been associated with the prætors, a union which must have had the effect of limiting their authority.

The Centumviri, or the "hundred men," were originally selected from the *centuriata*. It will be remembered that the three ancient tribes constituting the Roman people in the earliest times were divided each into ten *curiæ*. This was the most ancient division of the State, and to their solemn decision the term "lex" was applied—*lex curiata*. The college of the centumvirs appears at a very early period to have consisted of 105 members, three being chosen from each of the thirty, and from the five additional tribes. At a later period the number, we learn, was increased to 180. Thus Pliny says, "Sedebant judices centum et octoginta: tot enim quatuor consiliis conscribuntur." Plin. Ep. 633. The *hasta* or spear was set up in their tribunal as the symbol of dominion: hence the court received the name of "*hastæ judicium*," and we find the expression, "*centumviralis hasta*." When the *lex Æbutia* put an end to the *legis actiones*—a law passed, in all probability, at the commencement of the sixth century of the State—questions relating to "*damnum infectum*" and the "*centumvitalia judicia*,"

were left unaffected by the *lex*. As there were not thirty-five tribes at Rome until B. C. 241, some have supposed that the court of the *centumviri* was not in full operation until about this time. It is however by no means certain that this opinion is correct, for nothing seems more natural or more in accordance with the spirit of the early Roman constitution, than to suppose that a court constituted by a selection of competent men from the tribes should sit for the administration of justice. Gai. iv. 31. Gell. 16. 10. Puchta's *Instit.* 1. 334—338. Hein. *Ant. Rom.* iv. 6. 24. In the last citation will be found the views of Mühlenbruch, one of the best of modern jurists on this question.

Under the Emperors the court of the *centumviri* was divided into several parts or senates, named *consilia*, *hastæ*, *tribunalia*, etc. These sometimes sat alone, sometimes together (*quadruplex iudicium*). The power of the *centumviri* was limited to Rome, or at any rate to Italy. The questions which came under their consideration were “*actiones in rem*,” using the expression in its most extensive signification. Whether they had jurisdiction in any criminal matters, is a question which some jurists have disputed. Cicero mentions a variety of subjects that came under their cognizance, without probably intending to present an exhaustive list. He says, “*Jactare se in causis centumvirilibus, in quibus usucapionum, tutelarum, gentilitatum, agnationum, alluvionum, circumluvionum, nexorum, mancipiorum, parietum, luminum, stillicidiorum, testamentorum, raptorum aut ratorum, cæterarumque rerum, rerum innumerabilium jura versentur.*” Cic. de Orat. 1. 38. See also cap. 39. In the times of the Emperors, they especially, perhaps exclusively, adjudicated in matters relating to inheritance, and in cases of “*querela inofficiosi testamenti*,” over which they certainly had an exclusive jurisdiction. Hollweg thinks that the court of the *centumviri*, at the time of Augustus, had cognizance of the more important vindicationes, whilst the less important ones were determined *per sponsionem* and before a single judge (*iudex*). It is a singular fact

that this most republican institution should have come into renewed favour in the despotic times of the empire; and the fact helps to show that arbitrary power, as in France at the present moment, will not fail to avail itself of the forms of an ancient freedom, to obscure and consolidate what would otherwise be a conspicuous tyranny. The period of the duration of the tribunal of the centumviri is involved in as much obscurity as its origin. The latest mention of its existence is towards the close of the fourth century of the Christian era. It is probable that it lasted until the fall of the Western empire. See Keller's Civ. Proc. pp. 20—26. Instit Rom. Law, pp. 20, 21. Art. "Centumviri," Dict. Gr. and Rom. Antiq.

Of private judges there were three kinds—Judices, Arbitri, and Recuperatores. These judges were active in the very earliest times; their authority became limited by the *lex Æbutia*, and in the times of the Emperors they were called to the discharge of their duties only as the exception. The idea which prevailed originally was that the choice of the judge should in every case rest with the parties who had any matter in dispute. Arbitri as judges were permitted to employ a rule as yielding as the leaden one of the Lesbian architect. Hence, they were often called to decide in matters pertaining to the laying out of boundaries, and the division of the inheritance; or, because the parties themselves felt that they could not or did not desire to be bound by any stronger bond than that furnished by honour and equity. Or again, it sometimes happened that disputes rose for which the law provided no other mode of legal redress than that of arbitration. Thus, in questions relating to dower and in matters which required *bona fides*, where there was no restriction of either law or form, an arbiter was often, and indeed usually appointed. Such a judge was said to have an unfettered power of decision in regard to the entire matter in dispute (*totius rei arbitrium habuit et potestatem*). In the ancient instances we find generally a plurality of arbitri. In some instances we find a single Arbiter. By the

law of the Twelve Tables three arbiters might be named for the decision of matters relating to boundaries. By the same code we find that judges of this kind were appointed in the case of "*Arbitria de aqua pluvia arcenda*," and also of "*familiæ herciscundæ*," the latter of which was patterned upon the "*Arbitrium communi dividundo*."

The term *Judices* was applied to those judges whose duty it was to decide according to the *jus strictum*. In the limited sense in which the term judges was employed, no margin whatever was left for the individual opinion of the judge. The law was definitely laid down for his guidance, and all that was required from him was that he should pronounce, after due investigation, the sentence of guilty or not guilty. Thus Cicero says, "*Pecunia tibi debebatur certa. Quæ nunc petitur per judicem: . . . Judicium est pecuniæ certæ; Arbitrium incertæ. Ad judicium hoc modo venimus ut totam litem aut obtineamus, aut amittamus; ad arbitrium hoc animo adimus, ut neque nihil, neque tantum, quantum postulavimus, consequamur. Ejus rei ipsa verba formulæ testimonio sunt. Quid est in judicio? directum, asperum, simplex, etc.*" Pro Q. Roscio cap. 4. Thus it is clear that the judges were called to decide when the amount claimed was definite and certain. In a *judicium* the amount of the claim was certain, and the words of the formulæ will prove that if the plaintiff did not obtain all that he claimed, he got nothing. Gaius iv. 50. When the dispute was submitted to an *arbitrium*, as for example, in matters relating to dower (*rei uxoriæ*), the arbiter was permitted to use his own discretion and such words were added to the formulæ as *ex fide bona*. Gaius iv. 47. 62. Cic. Top. 17. Again, another point that is worthy of notice is that when a matter under dispute was submitted to the decision of a *judex*, in the strict sense of the term, the *judicium* was constituted with a penalty, and was said to be *per sponsionem*. There was, on the other hand, no *sponsio* or penalty when the decision was pronounced by an arbiter. It was the duty of the magistrates appointed by the State to lay down the law

applicable, and in cases of dispute to instruct the judge upon what legal doctrine or rule he was to base his decision.

Toward the close of the classical period of the Roman law, we find a judge denominated the *judex Pedaneus*. The *Pedanei* appear to have been thus designated, to distinguish them from the higher magistrates, as for instance from the *Prætor*, who was also called *judex*. Such judges, as their name imports, were in every respect subordinate, having jurisdiction only in matters of trifling importance. Their name, derived from *pes* (a foot)—as in the term “*pedarius*,” a subordinate senator—no doubt denoted their inferiority to the superior judges. Thus, *Julianus* says, “*Quædam sunt negotia, in quibus superfluum est moderatorem expectare provinciæ, ideoque pedaneus iudices, hoc est qui negotia humiliora disceptent, constituendi damus præsidibus potestatem.*” l. sec. 6. *Cod. de ped. judic.* (3. 3). *Nizolius* says, “*Pedaneus judex, qui a præside constituitur ut minora judicia discernat: quod is magistratus non vehatur curru sed pedibus proficiscatur in forum.*” Sub voce “*Pes*,” *Thesaurus Ling. Latini*.

The *Recuperatores* consisted usually of a collegium of five, but at times of only three members. In the earliest age they were a species of international judges appointed for the decision of disputes between Roman citizens (*cives*) and foreigners (*peregrini*); sometimes to decide between foreigners alone. They were especially active during the time of the procedure known as the *formula*, and were also permitted to give a more speedy decision than the regular judges. *Gai.* iv. 46, 105, 109, 141, 185. *Gai.* i. 18. and note *y* on sec. 20. They were, however, essentially international judges, taking cognisance of contracts that partook of an international character. The procedure they adopted was similar to the *legis actio per condictionem*, which did not require the exactness of the *jus civile*, but was what has been denominated *extraordinary*. At a later period the *recuperatores* were permitted to decide in conflicts between the *cives*, not simply as international judges, nor indeed as national judges

possessing an ordinary jurisdiction; but they had power to decide in questions affecting the State, and in certain police and criminal charges. It is now understood that during the Republic, as well as in the times of the jurists of the empire, these judges possessed an extensive sphere of operation. Not only had they in certain cases exclusive jurisdiction, but in some respects their jurisdiction was concurrent with that of the ordinary judges, whilst their mode of procedure continued peculiar. The recuperatores had jurisdiction in the *actio* and the *interdict*, “*de vi hominibus coactis armatisve*;” in the *interdict* with the concurrence of the *Judex* and the *Arbiter*; in the “*actio injuriarum*;” Gai. iii. 224; in cases of neglected or violated *radimonium*; in the suit of the patronus against the libertus on account of the latter citing his patron before the tribunal (*in jus vocatio*); and as already mentioned in what may be denominated state actions. The provincial jurisdiction of the Recuperatores extended to every species of action. Keller pp. 30—35.

The appointment of the *judices* rested partly with the magistrates, and partly with the litigants themselves. Thus the arbiters were sworn (*jurata*) by the magistrates, and were accepted for their functions by the parties who were themselves at variance. Some persons were incompetent by reason of physical infirmities, as deaf and dumb persons; some on account of age and character. Thus, persons under eighteen years of age were ineligible, whilst others were incapacitated by law and custom (*legibus ac moribus*). Paulus says, “*Non autem omnes iudices dari possunt ab his, qui iudicis dandi jus habent; quidam enim lege impediuntur, ne iudices sint, quidam natura, quidam moribus. Natura, ut surdus, mutus, et perpetuo furiosus, et impubes, quia iudicio carent. Lege impeditur qui Senatu motus est. Moribus feminae, et servi, non quia non habent iudicium, sed quia receptum est, ut civilibus officiis non fungantur.*” l. 12. s. 2. Dig. de iudic. et ubi quis. (5. l.) It did not, however, matter if the judges were *sui juris* or not. “*Qui possunt esse iudices, nihil interest, in potestate, an sui juris*

sint." l. 12. s. 3. Dig. tit. cit. (5. 1.) So far as the parties to a dispute themselves were concerned, if the law did not prevent their choice of a judge, their selection was respected. If, however, the case came before a magistrate, like the Prætor, it was only within a certain range that the selection could be made, as, for example, from the senate, or from the knights. Such was the custom till the time of Augustus, when an "album judicum selectorum" was constituted for "judicia privata." This "album" consisted of persons of senatorial rank, of *equites illustres*, possessing the rank of senators in the census; and of a lower grade of knights, termed "ducenarii," who had power to decide in minor suits. If a judex had been properly selected by the litigants, the sentence pronounced by him was held binding. In the time of the Empire the distinction between judices and arbitri gradually vanished, and the theory gained ground that only judices and judicia, in the strict sense of the term, were valid and decisive. All judicia were included under two classes—the one formal, and the other material. The formal were *stricti juris*, the latter *bonæ fidei*. In the municipalities and colonies the "album decurionum" stood in close relation with the "album judicum." Still, in the times of the empire, under Augustus, the plebs obtained a certain right to participate in the judicial office. In the provinces the judges were appointed by virtue of certain constitutional provisions, or were commissioned by the "conventus."

At Rome the recuperatores were probably chosen from a select body of persons. Huschke is of opinion that the choice was not confined to the "album judicum," an opinion which Keller thinks is scarcely supported by the arguments employed. Huschke's Recup. p. 240. Keller's Civ. Proc. pp. 41, 42.

As to the place in which the process itself was conducted a few words must suffice. We have seen that the suit was conducted partly *in jure* partly *in judicium*. Thus the Court in which the magistrate appointed by the state declared the law applicable to the case and in which the suit

was advanced, so as to be ready for the investigations and the decision of the *judex*, was called *jus*, and that which was done by him or before him was said to be done *in jure*. In Rome the place for the administration of justice was the comitium or the forum, in which was placed the *sella curulis* for the tribunal. Cic. Ver. ii. 38. In the time of the emperors, justice was administered in an open court—the so-called Basilica, a building which served not only as a court of law, but as an emporium for merchants. At a later period of the empire, the law was administered in a closed apartment called an *auditorium*. This court was indeed the audience-chamber of the emperor. l. 18. Dig. de min. vig. annis (4. 4.) In regard to this closed tribunal, *auditoria et tabularia*, see Vit. Archit. 5. 1. 4. Tac. Dial. de Orat. 39. The arrangements were similar in the Italian cities, and also in the Provinces. Keller's Civ. Proc. p. 10.

In the *ordinary* sittings of the court there was an actual investigation as to the ground of the matter in dispute, "*causæ cognitio*." In such cases the Prætor presided surrounded by his *consilium*, and the proceedings in such a suit were said to take place "*pro tribunali*." Such a solemn court was, however, only held when an actual "*causæ cognitio*," to be followed by a formal decree, was the object in view. Other matters connected with the administration of justice, as, for example, *interlocutiones* and *subscriptiones*, might take place on the floor of the court (*de plano*.) At a later period a peculiar term was applied to such informal audiences, and they were called "*sessiones de plano*." Thus Papinianus says, "*Si sint sessiones vel pro tribunali vel de plano*." Vat. Frag. 156. Compare 161, 163, 165. It was only matters that depended upon the free-will of the parties themselves, such as Mancipatio and Adoptio, that could be transacted on the "*plane bare earth*." For such proceedings the utmost freedom was allowed. Thus, the Prætor or the Pro-consul came to any place selected, and manumission might be effected in the bath or at the theatre. Gai. i. 20. We have already seen that in the provinces the magistrates

sat in the *Conventus*. See *Gai. i. s. 18*, and the note to that section.

As to the time of day that suits might be prosecuted in court, it appears to have been from the second to the tenth hour according to Roman reckoning. In the time of the Twelve Tables, it was from before mid-day until sundown. "*In comitio aut in foro ante meridiem causam con-jicito.*" *Gell. 17. 2.* "*Ante meridiem causam conjiciunt, quom perorant ambo præsentes. Post meridiem præsenti stlitum addicito. Sol occasus suprema tempestas esto.*" *Fest. "Supremum," Cic. Ver. ii. 7.*

It was not, however, upon every day that proceedings *in jure* could be conducted. The scanty knowledge that we possess upon this point renders its consideration exceedingly difficult. The days of the Roman calendar were divided according to different systems which were based entirely upon religious grounds. The principles which regulated this obscure question were partly *national*, and partly what may perhaps be denominated as *institutional*. The national element consisted in a *jus proprium* and *strictum*, giving rise to *dies fasti*, *dies nefasti*, and *dies festi*, and *profesti*. *Dies festi* were pre-eminently religious festival days devoted to *sacrificia*, *epulæ*, *ludi* and *feriæ*. *Dies fasti* comprised the *dies fasti* in the more strict and narrow sense of the term, and the *dies comitiales*. In the wider meaning of the word, *dies fasti* were all those days on which according to divine right there might be a solemn investigation in court in accordance with the "*legis actiones*," and on which also business might be transacted in the *comitia*. Such days were also called *dies comitiales*. In the more strict and precise sense the *dies nefasti* were those days in which suits might be prosecuted in accordance with the "*legis actiones*." *Dies* might be *fasti* in three different ways: 1. "*Dies fasti proprie et toti*," or simply "*dies fasti*," or days on which the *Prætor* could hold his court, and that at all hours. They were marked in the Roman calendar by the letter F, and their number in the course of the year, was 38. (*Niebuhr's Hist. of Rome*, iii.

p. 368.) 2. “*Dies proprie sed non toti fasti*,” or “*dies intercisi*,” days on which the prætor might hold his courts, but not at all hours, so that sometimes one half of such a day was *fastus*, while the other half was *nefastus*. Their number was 65 in the year, and they were marked in the calendar by the signs—Fp.=*fastus primo*, Np.=*nefastus primo*, En.=*endotercisus*, *intercisi*, Q. Rex C. F.=*quando Rex comitio fugit*, or *quando Rex comitiavit fas*, Q. St. Df.=*quando stercus defertur*). 3. “*Dies non proprie sed casu fasti*,” or days which were not *fasti*, properly speaking, but became *fasti* accidentally; a “*dies comitalis*,” for instance, might become *fastus*, if either during its whole course, or during a part of it, no comitia was held, so that it accordingly became either a “*dies fastus totus*,” or “*fastus ex parte*.” Macrob. Sat. 1. 16. L. Schmidt in Diet. Gr. and Rom. Antiq. Art. “*Dies*.” The term *dies nefasti* was applied to those days in which there could be no *legis actio*, neither in an actual suit at law nor in any matter relating thereto. “*Nefasti per quos dies nefas fari prætorem: do, dico, addico; itaque non potest agi; necesse enim aliquo eorum uti verbo, cum lege quid peragitur*.” According to Livy, they were said to have been fixed by Numa Pompilius. Liv. 1. 19. Varro de Ling. Lat. vi. 29—31. vii. 53. Macrob. saturn. I. 16.

The *dies festi* were those days on which legal decisions could only be given at certain times of the day, so that perhaps the morning and the evening were *nefas*. When the morning was excluded they were termed “*nefasti prioris*.” “*Intercisi dies sunt, per quos mane et vesperi est nefas, medio tempore inter hostiam cæsam et extra porrecta fas, etc.*” Var. Ling. Lat. vi. 31. The *nundinæ* which had originally been *dies fasti*, were made *nefasti*, but in B.C. 286, they were again made *fasti*, by a law of Q. Hortensius. Macrob. saturn. 1. 16. On the “*dies nefasti*,” proceedings were not suspended before a *judex*. Cic. Ver. 1. 10. Kel. p. 13 “*Dies festi*” and “*profesti*” were days impressed with a religious character. “*Festi dies Diis dicati sunt, profesti hominibus ob administrandum rem privatam publicamque concessi*.” Macrob.

l. c. Thus at the time of harvest and of the vintage, there could be no actions prosecuted either in the comitia or in the forum; but manumissions, or emancipations, or adoptions might take place on these days. On the “*dies festi*” the prætor as a religious officer of the State, dare not speak an unallowed word from his tribunal. The *dies religiosi et puri* were days set apart to commemorate unfortunate events, such as the defeat by the Gauls at the Allia, and they had no definite legal consequences, like the days already mentioned. When the legis actiones were abolished, the *dies fasti* and the *dies nefasti* lost their great importance, and at the same time the *dies festi* and *profesti*, standing as they did in such close connexion with them, ceased to be so carefully regarded. Still the days for the *ludi* or games were always held in high estimation. The great games however in the spring of the year and in the autumn, encroached so much upon the time devoted to the administration of justice, that what we might denominate as the business year, the “*Actus rerum*,” came to be divided between two seasons, the “*Menses æstivos*” and the “*Menses hibernos*.” Thus Suetonius says, “*Rerum actum, divisum antea in hibernos æstivosque menses conjunxit.*” Claud. 23. Comp. Gai. ii. 279. Such a limitation of the time devoted to justice must undoubtedly have occasioned the greatest inconvenience and delay. Hence in the early times of the Empire we find that the “*Actus rerum*” was enlarged, by abolishing some of the legal vacations, and by limiting the time allowed for others. Thus Suetonius again says, “*Triginta amplius dies, qui honorariis ludis occupabantur, actui rerum accommodavit.*” Oct. 32. And again, “*Judicibus . . . concessum a Claudio beneficium, ne hieme initioque anni ad judicandum evocarentur, eripuit.*” Gal. 14. compare Vesp. 10. M. Aurelius by a senatus-consultum appointed 230 days for the transaction of legal affairs, the 40 *dies fasti* and the 190 *dies comitiales*. Of these 230 *dies judicarii* the *dies feriati* were distinguished, so that on these days no public legal transactions were permitted, without the consent of the parties

interested. Papinianus says, "Si feriae sunt, libellos *det* contestarios." Vat. Frag. 156. Capitolinus, in his life of Marcus, says, "judiciariae rei singularem diligentiam adhibuit: fastis dies judicarios addidit, ita, ut 230 dies annuos rebus agendis litibusque disceptandis constitueret." Marc. 10. The litigants in a suit went into *jure* either "in propria persona," or they might if they chose be represented by "cognitores" or "procuratores." Such representatives were found, for instance, in the persons of the Patronus, or the Orator, or the Advocatus. In the times of the republic, the offices of the Orator and the Advocate were separate; but in the times of the Emperors they became united. Representation was permitted both for the purpose of assisting the party, as in the case of "cognitores;" and for the representation of any party during his absence or ignorance of the suit. Gai. iv. 83. 84.

2. In personam actio est qua agimus quotiens cum aliquo qui nobis vel ex contractu vel ex delicto obligatus est *contendimus*, id est cum intendimus dare, facere, praestare oportere.

2. That action is personal (*in personam actio*), in which we proceed against any one who is bound to us by contract (*ex contractu*), or by delict (*ex delicto*), that is to say, when we assert that he ought to give (*dare*), to do (*facere*), to perform (*praestare*).

3. In rem actio est, cum aut corporalem rem intendimus nostram esse, aut jus aliquod nobis competere, velut utendi, aut utendi fruendi, eundi, agendi aquamve ducendi, vel altius tollendi vel prospiciendi. Item actio ex diverso adversario (b) est negativa.

3. An action is real (*in rem actio*) when we maintain that a corporal thing is ours, or that some servitude (*jus*) appertains to us: as a mere use (*usus*), or a usufruct (*utendi fruendi*), or right of way (*eundi*), or of way for cattle (*agendi*) or of drawing water (*aquamve ducendi*), or of building higher (*altius tollendi*), or of prospect (*prospiciendi*). In these different cases our adversary has also against us a real action *negativa*.

(b) "Ex diverso adversario;" that is to say, that he against whom an action *in rem* was brought (the defendant

in the *actio confessoria*) might in his turn as plaintiff maintain that the claimant had no right to the property. The action, as already observed, was a real action when it was maintained that a corporal thing belonged to the plaintiff, or an absolute right, as, for instance, a "usus," or a "usufruct," or "right of way." A real action pre-supposes a person the *subject* of the right, and a thing the *object* of the right. Ulpianus says, "Actionem genera duo sunt in rem, quæ dicitur vindicatio, et in personam, quæ condictio appellatur. In rem actio est per quam rem nostram quæ ab alio possidetur petimus; et semper adversus eum est qui rem possidet. In personam actio est qua cum eo agimus qui obligatus est nobis ad faciendum aliquid vel dandum; et semper adversus eundem locum habet." l. 25. pr. Dig. de Obl. et Act. (4. 47.) See note to sec. 14.

4. Sic itaque discretis actionibus, certum est *non posse nos rem nostram ab alio ita petere, si PARET EUM DARE OPORTERE*: nec enim quod nostrum est, nobis dari potest, cum solum id dari nobis intellegatur quod *ita datur ut nostrum fiat*; nec res quæ *est nostra*, nostra amplius fieri potest. Plane odio furum, quo magis pluribus actionibus teneantur, effectum est, ut extra pœnam dupli aut quadrupli rei recipiendæ nomine fures ex hac actione etiam teneantur, *SI PARET EOS DARE OPORTERE*, quamvis sit etiam adversus eos hæc actio qua rem nostram esse petimus.

4. According to this division of actions, it is evident that we cannot reclaim our property from anyone in the form, "If it appears that he ought to give:" for that which is our own property cannot be said to be given to us, since that only is regarded as given to us which is bestowed upon us with the intention of transferring it into our possession; nor can a thing already belonging to us become our property more fully. Manifestly in hatred of thieves, and in order that they may be exposed to a greater number of actions, it was held that over and above the penalty of double or of fourfold, for the sake of again obtaining the property, thieves might be bound by this form of action: "If it appear that they ought to give." Although there still remains the real action against them by means of which we demand the thing itself as our own.

5. Appellantur autem in rem quidem actiones vindicationes; in personam vero actiones quibus dare fieri oportere intendimus condictiones. (c)

5. Real actions (*in rem*) are called vindications; but personal actions (*in personam*) in which we assert that the party must give or do something (*dare fieri oportere*) are named condictiones.

(c) The “in rem actio,” is that action by means of which we claim a thing as belonging to and as subjected to our immediate legal dominium. Such an action was also called a “vindicatio.” The term just mentioned was originally applied to that part of the “legis actio” which had for its object the formal adjustment of the possession of the thing in dispute, with the view to the introduction of a real action. Thus Gaius enumerating such actions says, “An action is real when we maintain that a corporal thing is ours, or that some servitude appertains to us, etc.” And then he adds, “In these different cases our adversary has also against us a real action *negativa*.” Mühl. Instit. p. 55. Gai. iv. 3. The gist of the question in a real action was the following:—Does the corporal thing as asserted in the Intentio belong to the Plaintiff? Again, in every real action there was a double *petitum*. First, that the Judex should acknowledge and declare the right of the Actor or Plaintiff; and, secondly, that this acknowledgment might be followed by a judgment in which the Reus or Defendant should be condemned. The basis and foundation of the action is a “jus in re.” Not merely, however, *dominium* or *proprietas* which the Germans call “Eigenthum;” but also a “jus in re aliena.” This is made manifest from the words of Gaius himself, for he enumerates actions arising from Servitudes, or “jura in re aliena” amongst the real actions. The defendant in a real action is not a definite person, and hence his name does not appear in the Intentio, but the action is against any person who in any way violates the right of the Plaintiff. As it is expressed, “Contra quemcunque possidentem.” The leading maxim in regard to the “vindicatio,” is the following: “Ubi rem meam invenio ibi vindico,” or in other words,

"Rem ipsam persequor." Instit. Rom. Law. part ii. s. 28. Actions "in personam" were called "condictiones;" a term which in its strict sense, was applied to those actions that were "stricti juris," as distinguished from actions "bonæ fidæ." "Appellamus autem in rem quidem actiones vindicationes, in personam vero actiones quibus dare facere oportere intenditur condictiones." s. 15. Instit. de act (4. 6.) Sometimes instead of the term "vindicatio," we find the expression "petitio," which denotes an "actio in rem," in contradistinction from an "actio in personam." Thus Papinianus says: "Actio in personam infertur, petitio in rem, persecutio in rem, vel in personam rei persequendæ gratia." l. 28. Dig. de oblig. (44. 7.) See also l. 178. s. 2. de verb. sig. (50. 16.)

6. Agimus autem interdum, ut rem tantum consequamur, interdum ut pœnam tantum, alias ut rem et pœnam.

6. We sometimes sue in order to obtain the thing itself, sometimes only to get the offender punished, at other times to secure both objects.

7. Rem tantum persequimur velut actionibus quibus ex contractu agimus.

7. We proceed against the thing only, for example, when we sue by means of the actions arising out of the contract (*ex contractu*).

8. Pœnam tantum consequimur velut actione furti et injuriarum, et secundum quorundam opinionem actione vi bonorum raptorum; nam ipsius rei et vindicatio et conditio nobis competit.

8. We take proceedings for penalties only, as for example by the action for theft and for injury (*actio furti et injuriarum*), and according to the opinion of some by the action "vi bonorum raptorum;" for the vindication of the thing itself, as well as the condiction appertains to us.

9. Rem vero et pœnam persequimur velut ex his causis ex quibus adversus infitiantem in duplum agimus: quod accidit per actionem judicati depensi, damni injuriæ legis Aquiliæ, et rerum legatarum nomine

9. Again we take proceedings both for the recovery of the thing and for the penalty, for instance, in the case where we sue for the double value against a party, on the ground of his denial of his liability, as in the

quæ per damnationem certæ relictæ sunt.

actions "judicati," "depensi," "damni injuriæ legis Aquilæ," or in order to obtain those legacies which have been left *per damnationem*.

10. Quædam præterea sunt actiones quæ ad legis actionem exprimuntur, quædam sua vi ac potestate constant. Quod ut manifestum fiat, opus est ut prius de legis actionibus loquamur.

10. Moreover, certain actions take effect through the *legis actio*, others exist by their own power and operation. In order to render this clear, it is necessary first to speak of the "legis actiones."

11. Actiones quas in usu veteres habuerunt legis actiones appellabantur, vel ideo quod legibus proditæ erant, quippe tunc edicta Prætoris quibus complures actiones introductæ sunt nondum in usu habebantur; vel ideo quia ipsarum legum verbis accommodatæ erant, et ideo immutabiles proinde atque leges observabantur. Unde cum quis de vitibus succisis ita egisset, ut in actione vites nominaret, responsum est eum rem perdidisse, quia debuisset arbores nominare, eo quod lex XII tabularum, ex qua de vitibus succisis actio competeret, generaliter de arboribus succisis loqueretur. (d)

11. The actions which were anciently in use were called "lêgis actiones," either because they were a creation of the law, since at that time the edicts of the Prætors, by means of which several actions were introduced, had not yet come into use; or it may be because those actions were accommodated to the very words of the laws, and for this reason were regarded as unchangeable as the laws themselves. Hence, to a Plaintiff who had sued for cutting his vines (*de vitibus succisis*), the answer of the jurists was that he had lost his suit, since he had in his action spoken of his vines (*vites*) whereas he ought to have employed the term trees (*arbores*), because the law of the Twelve Tables, by which the action was granted for damage done in cutting vines, spoke in general terms of cutting trees (*de arboribus succisis*.)

(d) The main feature of the earliest Roman Civil Process was the employment of certain solemn symbolical forms with verbal expressions, which took place "in jure" before a magistrate who had jurisdiction, as contradistinguished from legal written proceedings. The effect of such a transaction

was to evoke the decision of the magistrate in a corresponding formal and, if we may use the phrase, ritualistic expression. The litigants suing by this mode of procedure were said "*lege agere*," and the name "*legis actio*" was applied to the process itself. Pomponius in his brief history of the Roman Law says: "*Deinde ex his legibus (that is, from the laws of the Twelve Tables) eodem tempore fere actiones compositæ sunt, quibus inter se homines disceptarent; quas actiones ne populus, prout vellet, institueret, certes sollemnesque esse voluerunt; et appellatur hæc pars juris legis actiones, id est, legitimæ actiones.*" l. 2. s. 6 de orig. jur. (l. 2.) The *legis actiones* may be divided under two heads; namely, *processual actions*, and those which were modelled after them, and aimed at the establishment of certain legal results, by the acts and decisions of a voluntary tribunal. The *processual actions* consisted in those solemn fixed, legal and technical expressions, and corresponding symbolical and almost dramatic acts, which took place for the most part, though not always, in the presence of the magistrate. In relation to this obvious character of the "*jus civile*," with which the *legis actiones* were so closely connected, Cicero says, "*Omnia enim sunt posita ante oculos, collocata in usu quotidiano, in congressione hominum, atque in foro; neque ita multis literis aut voluminibus magnis continentur.*" Orat. l. 43.

These proceedings were no doubt originally regulated by the pontifices, but they had in historic times, as we learn from Gaius, the effect and validity of a *lex*. The words required to be spoken were of the most strict and exact character, and it was held to be necessary to observe the prescribed expressions, even to the very letter. The least departure from the strict form vitiated the whole proceeding, and rendered it utterly null and void. The expression "*caussa cadere*," was, in the very earliest period of the law, employed to denote the failure of the process from any defect in the mere form, in opposition to defects of a material nature. Thus, a plaintiff who had sued "*de viti-*

bus succisis," is said to have lost his suit, because he ought to have used the expression "de arboribus succisis," the words found in the Twelve Tables. It was in consequence of the too great nicety of this mode of legal procedure (*ex nimia subtilitate*), that by means of the *lex Æbutia*, a law probably passed in the early part of the sixth century of the State, and the "duas Julias (leges)," as Gaius says, iv. 30, probably referring to the "leges judiciarum," passed in the time of Augustus, these "legis actiones" were abolished, and a new process by means of the "formulæ," was introduced in their stead. Still, it should be remembered, that in all probability, for five hundred years this strict and peculiar mode of procedure was the only way in which legal redress could be obtained at Rome.

Of the five kinds of actions, mentioned by Gaius in section twelve of this book, the first three only were processual actions, whilst the two last were simply modes of execution and extrajudicial. The "legis actio sacramento" was an "actio in rem" for real rights, and an "actio in personam" for personal rights. It was applicable to all legal claims, and for all special actions. The "legis actio per judicis postulationem" was an action in which the Prætor was required to appoint a private judge. The "legis actio per condictionem," was a mode of suing for a debt due to one of the parties. The "legis actio per manus injectionem" was a strict and formal manner, by which a man, whose right had been invaded, obtained redress by his own personal act. The "legis actio per pignoris captionem" was also a mode of obtaining redress, by the creditor seizing on the property of the debtor in order to satisfy his claim.

The non processual "legis actiones" stood in close connexion with the real actions, and appear to have been modes of conveyance which took place before a tribunal created by the voluntary act of the parties themselves. Thus, the "in jure cessio" was a mode of transfer applicable to a variety of things. As for example, certain kinds of property could only be conveyed by the "in jure cessio." So also Mancipatio

Adoptio, Emancipatio, the transfer of the Tutela legitima, and of the Hereditas, were transactions of the most important character, which took place before a tribunal constituted by the free choice and selection of the parties themselves. It has been often maintained that the process known as the "legis actiones" was a mode of obtaining justice only accessible to those who were Roman citizens, an assertion by no means justified by the authorities. See Keller, i. 47. Thus, in ancient Rome, apart from the question of proof, in regard to which in the early period of the state the judge had but few limitations imposed, the hands of the judex were completely bound. An action proceeded rigidly according to law, and the least departure from the strict rules of procedure, even the placing of a wrong word in the forms employed, neutralised the whole proceedings, and frustrated the entire suit. See Jhering's "Geist des Römischen Recht," ii. pp. 108, 109.

12. Lege autem agebatur modis quinque: sacramento, per judicis postulationem, per conductionem, per manus injectionem, per pignoris captionem.

12. There were five kinds of "legis actiones:" the "sacramentum," the "judicis postulatio," the "condictio," the "manus injectio," the "pignoris captio."

13. Sacramenti actio generalis erat: de quibus enim rebus ut aliter ageretur lege cautum non erat, de his sacramento agebatur. Eaque actio perinde periculosa erat falsi nomine, atque hoc tempore periculosa est actio certæ creditæ pecuniæ propter sponsonem qua periclitatur reus, si temere neget, et restipulationem qua periclitatur actor, si non debitum petat; nam qui victus erat summam sacramenti præstabat pœnæ nomine; eaque in publicum cedebat prædesque eo nomine Prætori dabantur, non ut nunc sponsionis et restipulationis pœna lucro cedit adversario qui vicerit.

13. The "actio sacramenti" was of general application; for as to all things, for which the law had not given a special action, the "actio sacramenti" was employed. And this procedure was dangerous to those who employed it on a false pretext, just as at the present time the "actio certæ creditæ pecuniæ" is dangerous on account of the *sponsio*, which the defendant by a groundless denial runs the risk of losing, and the *restipulatio*, which the plaintiff runs the risk of losing by the plea of not indebted; for he who was vanquished rendered up the sum given as a *sacramentum* by way of

penalty; and it was forfeited to the public treasury, and on that account bondsmen were given to the Prætor, not as at the present time, for now the penalty of *sponsio* and of *restipulatio* goes as damages to the party who obtains the suit. (e)

(e) A modern jurist has said that the "Sponsio was a pledge made between two parties in pleading, and that it was a provocation which made them mutually adversaries." Such a remark is too much in the spirit of modern English jurisprudence which is apt to view ancient forms and institutions in the light of the insular notions which we have not only erroneously acquired, but have almost persuaded ourselves to be correct. It is, however, an egotistical and baneful method. To suppose that we have explained the Roman idea of Sponsio when we have said that it was a "pledge made between two parties *in pleading*," is incorrect to use no stronger term. It was only by means of the Sponsio made before the prætor that the litigant parties could obtain a "judicium." But the Sponsio might be both *præjudicialis* and *pœnalis*. In the former case its aim was to obtain a "judicium," and in the latter by the loss of the "Summa sponsionis," the party that failed was punished for venturing to bring a groundless action (*temere litigare*). This distinction is of importance, for the Sponsio was essentially a unilateral legal transaction. The Creditor asked a question, and the one who answered became his debtor (*ex contractu*). It was only just and fair that if the Defendant became liable to a penalty in the case of failure for the "Summa sponsionis," the Plaintiff, if he failed, should also be liable in like manner. Hence, in the "sponsio pœnalis" there was always what was termed a Restipulation by means of which the Plaintiff was bound as well as the Defendant. When the Sponsio was "mere præjudicialis" there was no restipulation. It is incorrect to state that the Sponsio first came into vogue as an organ of civil process after the abolition of the

“*legis actiones*.” It was of great and manifold importance at the time of the “*legis actiones*” in cases of Exceptions, Interdicts and other proceedings. In the time of the “*legis actiones*” the *Sponsio* was the means employed for the obtaining of a *iudex*. After the passing of the *lex Æbutia* the *Sponsio* was not only a method by which a formula might be obtained, but it was also a *succedaneum* employed to obtain a “*iudicium*,” and that without a formula. If the student will endeavour to realize the exclusive notions of a Roman he will apprehend what a very varied function the *Sponsio* must have played in the earliest Roman law. See Keller, pp. 99—106.

14. *Pœna autem sacramenti (f) aut quingenaria erat aut quinquagenaria. Nam de rebus mille æris plurisve quingentis assibus, de minoris vero quinquaginta assibus sacramento contendebatur; nam ita lege XII tabularum cautum erat. Sed si de libertate hominis controversia erat, etsi pretiosissimus homo esset, tamen ut 1 assibus sacramento contenderetur, eadem lege cautum est favoris causa, ne satisfactione onerarentur adsertores . . .* [Desunt 23 linæ.] (g)

14. But the penalty of the *sacramentum* was either five hundred or fifty asses; for as to property in litigation of the value of one thousand asses and over, the penalty was five hundred asses; for property on the other hand of less value it was fifty asses, for so it was provided by the law of the Twelve Tables. But if litigation arose in regard to the freedom of a slave, although the man might be most valuable, still the *sacramentum* was only to be fifty asses, this was provided by the same law for the sake of lenity that the intercessors for freedom (*adsertores*) might not be overburdened by their security (*satisfactio*).

(f) The fundamental character of the *sacramenti actio*, it is believed, consisted originally in the fact that each of the parties to the suit, upon stating his case to the magistrate, confirmed his assertions by the solemnity of an oath, at the same time depositing a sum of money to be forfeited as a penalty if he subsequently failed in the suit. This money, it is thought, was denominated *sacramentum*, and was de-

posited in a temple or some sacred place, and at a later period, in the treasury (*ærarium*). In the course of time, instead of a sum of money (*sacramentum*), bail was given to the Prætor for the required amount. When the issue of the suit proved that the oath had been rashly or falsely taken the sum was forfeited as a penalty for the perjury. The amount of the *sacramentum* was either 500 or 50 asses, according as the value of the object in litigation was 1000 asses or under. If the process related to a question of freedom (*liberale iudicium*), the smaller amount was required. This mitigated penalty appears not to have originated in any mean estimate of freedom, but in order that the “asser-tores in libertatem” might not be deterred from prosecuting their suit by the severity of the penalty in the case of failure. These fines dated from the times of the Twelve Tables, and they clearly prove two things—the sanctity with which the Romans in early times regarded an oath; and the high value that, even in the infancy of the State, they set upon liberty. In the “*legis actio per sacramentum*” the plaintiff made his claim, as some examples will presently make clear, in a prescribed solemn form of words; and the defendant, on his side, responded in a similar and equally formal manner. Upon this, both parties to the suit mutually demanded the *sacramentum*. The words used were, “*Sacramento, provoco.*” To which the defendant replied, “*Similiter ego te.*” Both plaintiff and defendant then swore that they were legally entitled to the property. Whether the term “*sacramento*” is a dative or an ablative, has been a question among jurists. Professor Goldschmidt, of Heidelberg, who has paid much attention to the subject, was of opinion that it was an ablative, and he would render the expression used as follows: “I demand from thee, through or by means of the *sacramentum*.” In later times, the oath, as we have already remarked, was dispensed with, but the sum as fixed by law was promised by both parties. After these introductory proceedings, a demand was made by the litigants for the appointment of a day (*perendie*) on which to

appear before the judges, either before the Centumviri, or before the Decemviri. After the passing of the *lex Pinaria*, (probably in the year 282 A.U.C., according to Huschke's conjecture) the space of thirty days was allowed to elapse, at the end of which both parties came a second time before the Prætor for the choice and appointment of a judge. After his nomination the parties fixed the third day (*comperendinum diem*) to appear before him. Gai. iv. 15. It was decided in this *judicium* whether the *sacramentum* of the plaintiff was correct or not. This was the point submitted to decision, whether the *judex* were *solus*, or whether the decision were given by the Decemviri or the Centumviri. It is obvious that the decision of the question which *sacramentum* should be forfeited would involve the decision of the strife and decide the right between the parties. Whether in this case there was an actual condemnation as well as an implied one has been a question of discussion among continental jurists. Keller and others doubt whether there was; whilst Huschke and Stinzing are of opinion that the condemnation also followed. That there was a condemnation for *actiones in rem* is quite certain. Gai. iv. 48. If the plaintiff in his suit had demanded too large an amount, which was called a "plus petitio," he failed in the entire suit. Suppose he had demanded 100, and the defendant denied that he was indebted to him in this amount. Suppose the judges after investigation were convinced that the defendant was indebted to the amount of 50 and no more, they could not condemn him to pay the smaller amount. The plaintiff had sworn that 100 was owing to him, and the *judex* had to decide "*utrius sacramentum justum utrius injustum sit.*" Cic. de Orat. i. 10; Mil. 27; Jhering's Geist. i. 158. The plaintiff was either entitled to the 100 or he was entitled to nothing. The man who was entitled to nothing, or to 10, or to 50, or to 99, stood in precisely the same situation. They were all defeated in the action and their "*sacramenta*" were declared to be "*injusta.*" Thus, as Keller says, the essence of the "*legis actio per*"

sacramentum" consisted in this—that it was "directum, asperum, simplex," in contradistinction from that which was "mite, moderatum." A "judicium" in this respect stood in direct oppositon to an "arbitrium." In every judicium all that was allowed, as Keller observes, was the blunt *Yes* or *No*, *Guilty* or *Not Guilty*. Civ. Proc. p. 52. No application of equitable principles was admissible in such a case. If it were necessary to have recourse to such principles another form of action should have been employed by the suitors.

A "legis actio per sacramentum in rem" admitted of a twofold division. It might be either a "vindicatio," or an "actio confessoria" or "negatoria." The Vindicatio was employed in many instances, as in the case of *Dominium*, *Hereditas*, *Family rights*, and the "*jus personarum*" generally. In the Vindicatio the first act of the plaintiff was what may be denominated as symbolic "self-help" (*manus conserere*); that is to say, both parties by a physical act asserted their title to, and their dominium over, the thing in dispute. Both came forward as plaintiffs in the action—the real plaintiff coming first. As the defendant made the same demand as the plaintiff, it follows that there was a "vindicatio," and a "contra vindicatio." When the dispute arose about moveables, the moveable thing, or a part of it, was brought into the presence of the magistrate *in jure*. Both the claimants then grasped the thing, and touched it either with the "vindicta," or with the "festuca," by these symbolic acts affirming their ownership. It was from the touching of the thing with the staff, (*vindicta*) that the process obtained the designation of "vindicatio." The plaintiff said, "Hunc ego hominem ex jure Quiritium meum aio, etc." Upon which the plaintiff uttered precisely the same words. Gai. iv. 16. 17. Aul. Gell. N. A. xx. c. 10. 1. 7—10. When the controversy had reference to a thing that was not a moveable but an immoveable thing, the Vindicatio took place originally on the immoveable property itself, the magistrate accompanying the suitors to the spot. Subsequently this was abolished, and the plaintiff summoned

the defendant to appear before the magistrate, and upon his appearing, the plaintiff demanded that the defendant should come *ex jure* for the purpose of vindicating the property which he claimed, (*manu conserere ex voco*). When this was done they came again into *jus*. At a later period of the law a part only of the thing vindicated was brought into *jus*, as a sheep from the flock, a clod from the land, or a tile from the house. Gai. iv. 17. This part was presented to the court as a representation of the whole, and the Vindicatio was then allowed to proceed in the same manner as in the case of moveables. Gellius in loco. Cic. pro Murena 12. 26. When the dispute had reached this stage, the prætor as magistrate requested the parties to relax their hold upon the disputed property (*mittite ambo*), which being done, he decided which of the parties should have possession of the property during the continuance, and until the conclusion of the suit. This was said "dare vindicias." Gell. 20. c. 19. l. 2. s. 24, Dig. de orig. jur. (1.2). "Vindicarum est, quum litigatur de ea re apud prætorem, cujus incertum est, quis debeat esse possessor." Bris. sub voce "Vindicia." The possessor was then required to give security (*prædes dare litis et vindicarum*), by which he was bound to return the property into the court with its fruits, whenever he might be ordered so to do.

In the "actio negatoria" the plaintiff claimed that he had a servitude (*jus in re aliena*) in the property of the defendant. The defendant in denying his right used the words, "Nego tibi jus esto," and hence the suit was called "negatoria." In the "actio confessoria," the word *aio* was employed, and from this affirmative expression, the actio has in later times received the name of "confessoria."

The ritual for the "legis actio in personam" in the early times of the state, is unknown until we meet with the first formula, "Aio te mihi dare oportere." We will close this note by presenting in a compendious form the proceedings in both personal and real actions.

1. *Actio in personam.*

Plaintiff.—“Aio te mihi x Milia Æris dare oportere.” Defendant denies the assertion. Plaintiff.—“Quando negas, te sacramento quingenario provoco.” Defendant.—“Quando ais neque negas, te sacramento quingenario provoco.” Then followed the deposition of the “summa sacramenti” or the appointment of “prædes,” which was the security required from both parties. This was followed by the mutual demand for the appointment of a day to appear before the Decemviri. After the passing of the lex Pinaria the parties appeared before the prætor on the thirtieth day “ad iudicium capiendum.”

2. *Actio in rem.* A dispute in regard to land.

Plaintiff.—“Fundus qui est in agro qui Sabinus vocatur, eum ego ex jure Quiritium meum esse aio.” Defendant.—“Unde tu me ex jure manu consertum vocasti, inde ibi ego te revoco.” Prætor.—“Suis utrisque superstitibus præsentibus istam viam dico. Inite viam.” Upon which both the parties retired accompanied by a Lictor, in order to fetch a clod of earth. Prætor.—“Redite viam.” The suitors bring the clod of earth. Plaintiff.—“Hunc ego fundum ex jure Quiritium meum esse aio, secundum suam causam sicut dixi: ecce tibi vindicatam imposui.” Defendant repeats the same words. Prætor.—“Mitte, Discedite,” etc. These words were uttered to allay the strife between the parties, in order to its decision by the proper authorities. Plaintiff.—“Postulo anne dicas qua ex causa vindicaveris.” Defendant.—“Jus perege sicut vindictam imposui.” Plaintiff.—“Quando tu injuria vindicavisti, v. Æris sacramento te provoco.” Defendant.—“Similiter ego te” or “Ego te provoco.”

This was followed as in the “actio in personam,” by the parties mutually demanding the appointment of a day to appear before the Decemviri or the Centumviri, or an order to bind the parties to appear again before the prætor on the thirtieth day “ad iudicem capiendum.” This being done the prætor ordered the “vindiciæ,” and imposed the “dare prædes litis et vindiciarum” on the holder of the property for the time being, and on the defendant in favour of the

plaintiff, and finally received from both litigant parties "prædes" or security for the "summa sacramenti." Keller's Civ. Proc. pp. 56—58.

It is not to be supposed that the forms of action we have given are exhaustive of the mode of procedure in these early times. There can be no doubt, although we possess no certain information on the point, that the actions *confessoria* and *negatoria* as they are now called, for the terms are of modern invention, differed in important points from the forms just given. These actions for the vindication of servitudes and to secure the freedom of property from easements which were really an encroachment on ownership, had probably forms such as the following:—

Vindicator.—"Aio mihi jus esse eundi agendi in fundo;" or, "altius tollendi ædes." as the case might be. Contra-Vindicator.—"Nego tibi jus esse eundi agendi in fundo;" or, "altius tollendi ædes." On the other hand the form might be: Vindicator.—"Nego tibi jusesse, etc." Contra-Vindicator.—"Aio mihi jus esse, etc." The above forms for "actiones in rem" and "in personam," are derived partly from the statements of Cicero, and partly from Gaius himself. See Keller's Civ. Proc. pp. 47—61. Puchta's Instit. ii. p. 33. l. 129 et seq.

(g) The first half of the page of the MS. at this point is quite illegible. Heffter has endeavoured to restore it by conjecture, and proposes to read as follows: "Nunc admonendi sumus, istas omnes actiones certis quibusdam et solemnibus verbis peragi debuisse. Si verbi gratia in personam agebatur contra eum qui nexu se obligaverat, actor eum apud Prætorem ita interrogabat: quando in jure, te conspicio, postulo an fias auctor, qua de re nexum mecum fecisti? Et altero negante, ille dicebat. Quando negas, sacramento quingenario te provoco, si propter te fidemve tuam captus frandatusve siem. Deinde adversarius quoque dicebat: Quando ais neque negas me nexum fecisse tecum, qua de re agitur, similiter ego te sacramento quingenario provoco, si

propter me fidemve meam captus fraudatusve non sies. Quibus ab utraque parte peractis litigatores poscebant judicem, et Prætor ipsis diem præstituebat, quo ad judicem accipiendum venirent."

15. ad judicem accipiendum venirent. Postea vero reversis dabatur *post* diem xxx judex: *idque* per legem Pinariam factum est; ante eam autem legem dabatur judex. Illud ex superioribus intellegimus, si de re minoris quam M æris agebatur, quinquagenario sacramento, non quingenario eos contendere solitos fuisse. Postea tamen quum judex datus esset, comperendinum diem, ut ad judicem venirent, denuntiabant. Deinde cum ad judicem venerant, antequam aput cum *causam* perorarent, solebant breviter ei et quasi per judicem rem exponere: quæ dicebatur causæ collectio, quasi causa suæ in breve coactio. (*h*)

15. they came in order to accept a *judex*. But after thirty days upon their second appearance a *judex* was given; and that is decided by the *lex Pinaria*; but before the period of that law (no) *judex* was given. We perceive from what has been said above, that if the suit was for less than a thousand asses, the *sacramentum* was usually fifty asses and not five hundred. After the nomination of the judge, the parties fixed the third day (*comperendinum diem*) to come before him. When they were in his presence, before they defended their suit (*causam perorarent*), they were accustomed briefly and summarily to explain the subject in dispute to him: this was called the "*causæ collectio*," as being a concise resumé of the cause.

(*h*) Rudorff, in commenting upon Puchta's statement that a *judex* was nominated by the *lex Pinaria* in personal actions, says, that it is much more certain that one was appointed in real actions, and in support of his opinion quotes the Pseudo-Asconius, "Namque cum in rem aliquam agerent litigatores et pœna se sacramenti peterent, poscebant judicem, qui dabatur post trigesimum diem." C. Orell. p. 164. In relation to the period of thirty days which was allowed to elapse before the suitors reappeared before the prætor for the appointment of a *judex*, the *lex Pinaria* contained a distinct enactment: "Antiquissimam legem fuisse incisam in columna ærea L. Pinario et Furio consulibus (282) cui mentio intercalaris adscribitur." Macrob. Sat. 1. 13. 1. 2.

Dig. de div. temp. (44.3) Cato de re rust. c. 150. By the lex Rupilia the interval of thirty days from the time of petitioning the Court for a judex to his appointment was also extended to provincial jurisdictions. "Quod lex Rupilia vetaret diebus triginta sortiri dicam, quibus scripta esset." Cic. Ver. 2. 2. 15. When the judex was appointed, the "contestatio litis" took place the third day after the adjournment. (*Comperendinatio*.) Paulus says, "Res comperendinata significat judicium in diem tertium constitutum." Ex Festo sub voce. Cicero says, "Diem tertium an perendinum." Pro. Mur. c. 12. The interval between the second appearance of the litigants before the Prætor, and their appearance before the judge was only one clear day. Cicero refers to this when he says, "Unum quasi comperendinatus, medium diem fuisse." Brut. c. 22. By the appointment of a judex, Rudorff thinks that the opinion of those who regarded the "sacramento actio" as essentially a plebescitum is rebutted; but Mommsen and other writers are of opinion that there was a "mandata jurisdictio" to the private judge (*privatus judex*), the effect of which was that, acting for the people, his decision had the force of law. See Rudorff on this subject in Puchta's Instit. vol. ii. p. 33.

16. Si in rem agebatur, mobilia quidem et moventia, quæ modo in jus adferri adducive possent, in jure vindicabantur ad hunc modum. Qui vindicabat festucam tenebat. Deinde ipsam rem adprehendebat, velut hominem, et ita dicebat: HUNC EGO HOMINEM EX JURE QUIRITIUM MEUM ESSE AIO SECUNDUM SUAM CAUSAM SICUT DIXI. ECCE TIBI VINDICTAM (i) INPOSUI: et simul homini festucam inponebat. Adversarius eadem similiter dicebat et faciebat. Cum uterque vindicasset, Prætor dicebat: MITTITE AMBO HOMINEM. Illi mittebant. Qui prior vindicaverat, ita alterum inter-

16. If the action were a real action (*in rem*) the moveable things, and things able to move themselves and which could only be led or brought before the Prætor (*in jus*) were vindicated *in jure* in the following manner. He who vindicated holding the staff (*festuca*) immediately seized the thing itself, for example, the slave, and thus spoke, "I say that this slave is mine in quiritarian ownership, with all that appertains to him, as I have already declared. Mark, I have placed this *vindicta* on thee," at the same instant placing the staff on the slave.

rogabat: POSTULO ANNE DICAS QUAE EX CAUSA VINDICAVERIS. Ille respondēbat: JUS PEREGI SICUT VINDICTAM INPOSUI. Deinde qui prior vindicaverat dicebat: QUANDO TU INJURIA VINDICAVISTI, DÆRIS SACRAMENTO ME PROVOCO. Adversarius quoque dicebat: SIMILITER EGO TE. Sen L asses sacramenti nominabant. Deinde eadem sequebantur quæ cum in personam ageretur. Postea Prætor secundum alterum eorum vindicias dicebat, id est interim aliquem possessorem constituēbat, eumque jubebat prædes adversario dare litis et vindiciarum, id est rei et fructuum: alios autem prædes ipse Prætor ab utroque accipiebat sacramenti, quod id in publicum cedebat. Festuca autem utebantur quasi hastæ loco, signo quodam justī domini: maxime enim sua esse credebant quæ ex hostibus cepissent; unde in centumviralibus judiciis hasta præponitur.

The other party claiming uttered similar words, and used the same forms. When both had thus vindicated (the slave), the Prætor said "Let both release this slave," (*mittite ambo hominem*). Upon which, they both released him. The party first vindicating then continued, "I ask, if you can answer, on what legal ground you have vindicated?" The other replied, "I have taken proceedings before the Prætor, thus have I imposed this staff." The first again answered, "As you have vindicated unjustly, I demand from you five hundred asses as a *sacramentum*." His opponent replied "I make a similar demand," (*similiter ego te*) or they named fifty asses as *sacramentum*. After this, the suit proceeded as in a personal action, then the Prætor decided in favour of one of the claimants as to the *vindiciæ*, that is to say, he appointed, for the time being, one of the parties possessor, and ordered him to give security for the thing, and the fruits thereof to his adversary (*prædes litis et vindiciarum*), but the Prætor also himself received security from both parties for the payment of the *sacramentum*, since this belonged to the public treasure. Now a staff was used as it were in the place of a spear, (*hastæ loco*) as a symbol of legally acknowledged dominium; since that was especially regarded as the property of a man, which he had captured from the enemy; hence a spear is placed before the tribunal of the centumvirs.

(i) "Vindiciæ . . . de quo verbo Cincius ait: 'Vindiciæ olim dicebantur illæ, quæ ex fundo sumptæ in jus adlatæ erant.' Fest. v. 'Vindiciæ.' The term in its simplest signification means a thing to which one lays claim by a

suit at law : and hence it comes to mean the judicial or formal claiming of a thing or a person. Sometimes it is applied simply to the sentence of the judge. In the present passage it refers to the decision of the prætor in favour of one of the litigant parties, by means of which the possession of the disputed property was given to one of them, who was bound to give security to his opponent for the thing in dispute and for the mesne profits, or, to use the words of Gaius, “jubebat prædes adversario dare litis et vindicarum.” It is also to be observed that the prætor took security from both plaintiff and defendant for the amount of the *sacramentum*, or the sum of money to be forfeited to the *Ærarium* by the unsuccessful suitor. An interesting reference to the *Vindiciæ* is made by Pomponius in l. 2. s. 24. de orig. jur. (1. 2.) Festus, under the word “*Vindiciæ*,” says, “*Vindiciæ appellantur res eæ de quibus controversia : quod potius dicitur jus, quia fit inter eos qui contendunt.*” Again, “*At Ser. Sulpicius . . . jam singulariter formato vindiciam esse ait . . . qua de re controversia est, ab eo quod vindicatur . . . et in duodecim : si vindiciam falsam tulit rei sive stlitis [the old form for *lis*] prætor arbitros tres dato eorum arbitrio reus fructus duplione damnum decidito.*” Gaius iv. 91. 94. Varro de Ling. Lat. vi. 74.

17. Si qua res talis erat, *ut non sine incommodo posset in jus adferri vel adduci, velut si columna aut grex alicujus pecoris esset, pars aliqua inde sumebatur. Deinde in eam partem quasi in totam rem præsentem fiebat vindicatio. Itaque ex grege vel una ovis aut capra in jus adducebatur, vel etiam pilus inde sumebatur et in jus adferebatur; ex nave vero et columna aliqua pars deringebatur. Similiter si de fundo vel de ædibus sive de hereditate controversia erat, pars aliqua inde sumebatur et in jus adferebatur et in eam partem perinde atque*

17. If the thing was such that it could not be conveniently carried or led to the Prætor (*in jus*), for example, if it were a column or a flock of sheep, a part only of it was taken, and the vindication proceeded upon this part as if the whole had been present; hence a single sheep or goat was taken from the flock, or even a single hair was taken, and borne to the Prætor (*in jus*); again, from a ship or from a column some portion was broken off; in a similar manner when the dispute was in respect to a piece of ground, or a building, or an inheritance, a part only was taken

in totam rem præsentem fiebat vindicatio: velut ex fundo gleba sumebatur et ex ædibus tegula, et si de hereditate controversia erat, æque . . . [folium deperditum.] (j)

and brought to the Prætor, and the vindication took place on this part, in the same manner as if the whole had been present; for example, from a plot of land a clod was taken, and a tile from a house; and if the dispute were in respect to the inheritance

(j) An entire page is lost at the end of this section. Goeschen thinks that in the lost folio Gaius had completed his explanation of the *legis actio sacramento*; then that he had described the *legis actio per iudices postulationem*; and finally had commenced to treat of the *legis actio per condictionem*. See Domenget, p. 485 in loco, and Ortolan, tit. 3. p. 494.

18. Et hæc quidem actio proprie *condictio* vocabatur: nam actor adversario denunciabat, ut ad iudicem capiendum die xxx adesset. Nunc vero non proprie *condictionem* dicimus actionem in personam esse, qua intendimus dare nobis oportere: nulla enim hoc tempore eo nomine denuntiatio fit. (k)

18. And this action was properly named "*condictio*;" for the plaintiff announced to his adversary that he should appear in thirty days in order to appoint a *iudex*; but at present "*condictio*" is improperly called a personal action, by which we assert that a thing ought to be given to us (*dare nobis oportere*), for at the present time an announcement (*denuntiatio*) on that ground is no longer made.

(k) Gaius in the text explains the meaning of the term *Condictio*, and the nature of the "*legis actio per condictionem*." Justinian says, "*Condicere est denunciare prisca lingua*." To which he adds, "*Nunc vero abusive dicimus condictionem actionem in personam esse, qua actor intendit dari sibi oportere, etc.*" s. 15. Instit. de action. (4. 6. This action was used when a demand was made upon a debtor for the payment of a debt. The name was derived from the "*denuntiatio*" or summons of the plaintiff commanding the defendant to meet him *in jure* in thirty days for the appointment of a judge, "*ad iudicem capiendum*." Origin-

ally, as already explained, personal actions were prosecuted either by means of the "*legis actio sacramento*," or by the "*judicis postulatio*." It was not till a later period that the "*legis actio per condictionem*" arose, by the aid of which the plaintiff was at once able to cite the defendant for a *dare* before a magistrate, and after securing the appointment of a judge, successfully to prosecute his claim. By the *lex Silia*, this form was established for a settled sum of money and by a further law—the *lex Calpurnia*,—it was extended so as to apply to all kinds of actions for a "*res certa*." Thus the Plaintiff might sue for 100 bushels of the best African wheat, in which case he would proceed for both quantity and quality. Professor Goldschmidt thinks, that after the passing of the *lex Silia*, this procedure might take place before *Recuperatores*; and that the law just mentioned was probably older than the *lex Æbutia*. Some are of opinion that the advantage of this action over the "*legis actio sacramento*" consisted in the fact of its being a much more summary method of procedure. It has been also suggested that this process was extraordinary; that less evidence was required, and that perhaps there was a solemn oath taken by the plaintiff in support of his claim. Keller thinks that the "*actio legis per condictionem*," was an improvement upon the *legis actiones* already mentioned, inasmuch as it was not only a shorter process, but that it was manifestly a mode of procedure far more simple in its requirements. In the two former actions there were set forms and important solemnities to be observed before the *Prætor*, whilst in the "*condictio*" all that was required was simply to apply to the *Prætor* for the appointment of a judge. Instead, therefore, of two appearances before the magistrate, probably only one was necessary. The set form of words (*solennia verba*) required in the "*legis actio sacramento*," it is thought, were not required, and the formal utterances were so simplified, that there was far less danger of the litigants in the suit miscarrying on mere verbal or technical grounds. Keller likewise thinks that after the passing

of the *lex Silia*, there came into use, the “*sponsio*,” with the “*restipulatio tertiæ partis*.” As we have already observed, the term “*condictio*” continued to be employed in Roman law, for it was the name given, after the “*legis actiones*” were abolished, to all “*actiones in personam*,” though, as Justinian observes, it was used incorrectly, for the “*denuntiatio*” or notice from which the term “*condictio*” was derived, was no longer required in the procedure. Keller’s *Cic. Proc.* pp. 69—75; Walter’s *Rechts Geschich.* s. 679; Puchta’s *Instit.* vol. ii. s. 162.

19. *Hæc autem legis actio constituta est per legem Siliam et Calpurniam: lege quidem Silia certæ pecuniæ, lege vero Calpurnia de omni certa re.*

19. This action of law was established by the *lex Silia* and *Calpurnia*; the *lex Silia* relates to the recovery of a certain sum of money, and the *lex Calpurnia* to every other thing.

20. *Quare autem hæc actio considerata sit, cum de eo quod nobis dari oportet potuerimus sacramento aut per iudicis postulationem agere, valde quæritur. (l)*

20. It has been a question often raised, what was the advantage of this action (*condictio*), since in regard to that which was due to us, we could proceed by the *actio sacramenti* or by the *iudicis postulatio*.

(l) Our knowledge is limited and uncertain in regard to this form of action, for the account given by Gaius is unfortunately illegible. It is thought to have been a mode of procedure before the prætor in which he was solicited to appoint a judge. The form of application was probably as follows: “*T. Prætor Judicem arbitrumve postulo uti des*,” the letter T standing for the name of the judge asked for. Puchta was of opinion that the “*legis actio per iudicis postulationem*” was of more recent date than the “*actio sacramento*.” Keller is of a different opinion. The parties to the suit appear to have presented themselves before the Prætor soliciting from him a judge or arbiter, to whose sentence they promised to submit. Such an appeal to arbitration would necessitate a certain form of procedure

which Walter is of opinion had a much larger range in many instances than the "*legis actio sacramento*." Puchta thinks that at a very early period it was deemed necessary to have a judge who should be permitted to frame his decisions upon broader principles than those which regulated the *judices* of the ordinary tribunals, and that it was this felt necessity which gave rise to the "*legis actio per judicis arbitrive postulationem*." The Twelve Tables permitted "three *arbitri*" to decide in cases relating to boundaries and water courses, and also "*si quis vindiciam falsam tulerit*," and there was a similar "*arbitrium litis æstimandæ*" for personal actions, to obtain the assessing of a pecuniary penalty (*condemnatio in ipsam rem*). Cæsar says, "*Arbitros inter civitates, dat, qui litem æstiment, pœnamque constituent*." Cæsar. *Bel. Gal.* 5. 1. Cic. *Top.* 9. l. 24. *Dig. de aqua pluvi.* (39. 3) l. 23. s. ult. eod. "*Arbitrum aquæ pluvie arcendæ*." Festus v. *vindiciæ* s. 232 n. After the time of the Twelve Tables there was a constant tendency to confine the "*officium judicis*" to a single judge, until by the passing of the *lex Æbutia*, which led to the introduction of a new procedure, the decision rested with a single judge, and the tribunals of the *Decemviri* and *Centumviri* were only applied to when they were the judges prescribed in accordance with the older process, or were chosen to decide by the free will of the litigant parties themselves. In the later procedure at Rome, a distinction arose in relation to the object for which the defendant should be condemned if he failed in the process, and also in relation to the right or wrong, the justice or the injustice of the dispute between the parties. In both these cases a freer rule came into use. Hence arose two kinds of *arbitri*—one which had to deal with an *arbitriæ formulæ*, which permitted something to be done or exhibited by the arbitration of the judge (*arbitratu judicis*); the other consisting of those who had power to decide what one party ought to do to the other "*ex fide bona*" or "*quantum æquis melius sit, dari repromittive*," or to determine the matters in litigation between the parties

in such a way “ut inter bonos agier oportet,” Cicero distinguished between the *judex* and the *arbiter*: “Eundemne tu arbitrium et judicem sumebas? Eidem et infinitam largitionem remittebas (to the *Arbiter*), et eundem in angustissimam formulam sponsonis concludebas” (as *Judex*)? “Quis umquam,” he adds, “ad arbitrium quantum petiit, tantum abstulit? Nemo. Quantum enim æquius esset sibi dari, petiit.” Pro Q. Roscio 4. compare Top. 17. a.

The peculiarity of the “*legis actio per judicis postulationem*,” consisted in the composition of the tribunal appointed for the decision of the strife. This peculiarity was exhibited in the very form of expression employed by the parties themselves:—“*Judicem arbitrumve postulo uti des*,”—which words were spoken by both the suitors at the time that each named an *arbiter*, after which the *Prætor* himself seems to have added a third. Puchta’s *Instit.* vol. ii. pp. 32—48. 92; Walter’s *Rechts Geschich.* s. 669; Keller *Civ. Proc.* s. 17. pp. 64—69.

21. *Per manus injectionem* (*m*) *æque de his rebus agebatur, de quibus ut ita ageretur, lege aliqua cautum est, velut judicati lege XII tabularum. Quæ actio talis erat. Qui agebat sic dicebat: QUOD TU MIHI JUDICATUS SIVE DAMNATUS ES SESTERTIUM X MILIA QUE DOLO MALO NON SOLVISTI, OB EAM REM EGO TIBI SESTERTIUM X MILIUM JUDICATI MANUS INICIO*; et simul aliquam partem corporis ejus prendebat. Nec licebat judicato manum sibi depellere et pro se lege agere; sed vindicem dabat, qui pro se causam agere solebat: qui vindicem non dabat, domum ducebatur ab actore et vinciebatur.

21. The proceeding by means of the “*manus injectio*” was employed in cases similar to those contemplated by the *lex Aquilia*, as also against those condemned (*judicati*) according to the law of the Twelve Tables. This process was as follows. The plaintiff said, “because you are adjudged or condemned to give me 10,000 sesterces, which you *dolo malo* have not paid, so in consequence of this, I lay my hand on you for this 10,000 sesterces,” and at the same instant he laid hold of some part of the defendant’s body; the defendant in this case could not repel the hand of the plaintiff and proceed with the suit in his own name; he appointed a *vindex* to act for him, who carried on the suit, but when no such agent was appointed to defend, the man condemned (*judicatus*) was led home by the plaintiff and fettered.

(m) The "*legis actio per manus injectionem*" was a formal means of "self-help," of which a creditor was permitted to avail himself in many cases. A set form of words, or ritual, was required to be employed by the plaintiff. As the rule, it was a private personal mode of execution rather than an action. The creditor might seize his debtor by actual force, and compel him to accompany him to the Prætor, in whose presence he declared how much the defendant was indebted to him, and the nature and ground of the obligation. "*Quod tu mihi judicatus sive damnatus es sestercium x milia, quæ dolo malo non solvisti, ob eam rem ego tibi sestertium x milium judicati manus injicio.*" Gai. iv. 21. For a long period of time at Rome, if a defendant who was summoned to appear before the Prætor (*in jus vocare*), refused to go, the plaintiff might lawfully use force to compel him. This right and custom was as old as the times of the Twelve Tables. The Decemviri say "*Si in jus vocat, ni it, antestator: igitur em capito.*" Again, "*Si calvitur pedemve struit, manum endo jacio.*" See Gneist Duodecim Tab. Frag. p. 12 and the notes thereto. The arrest of a person whom it was desirable to bring into a court of justice, was made by the act of the plaintiff himself, and not by an officer of the court. This gave rise, as might be supposed, to scenes, the description of which have reached our times through the classical writers of antiquity. One or two examples will serve to illustrate the mode in which the "*in jus vocatio*" was managed. Horace says:

. . . . "Casu venit obvius illi
Adversarius et: '*Quo tu, turpissime?*' magna
Exclamat voce; et: '*Licet antestari?*' Ego vero
Oppono auriculam. Rapit in jus: clamor utrimque:
Undique concursus."

Horat. Sermon. Lib. 1. Sat. 9. v. 74 et seq.

It was usual for a man to touch the ear of the person whom he intended to call as a witness.

Again Plautus describes a similar scene and disturbance :

“ PH.—Ambula in jus. TH.—Non eo. PH.—Licet te antestari? TH.—Non licet.

PH.—Juppiter te male perdat : intestatus vivo.

CURC.—At ego, quem licet, te. PH.—Adcede huc. TH.—Servom antestari! vide.

CURC.—Hem! ut scias me liberum esse. TH.—Ergo ambula in jus heus tibi!

CURC.—O cives, cives! TH.—Quid clamas? PH.—Quid istam tibi tactio est?

TH.—Quia mihi libitum est.” . . .

Curcul. Act v. sc. 2. v. 23. et seq.

Again :—

“ SATURIUS.—Age, ambula in jus, leno. DORD.—Quid me in jus vocas?

SAT.—Illi apud Prætorem dicam : sed ego in jus voco.”

Persa, Act iv. sc. 9. v. 8 et seq.

Neither old nor suffering persons could be forced in this rude way to go before the Prætor, nor could a man be dragged by his creditor out of his own house. This mode of arrest was permitted not only in criminal but also in civil cases. It was not however everybody who could be thus forced into *jus*. Ulpianus observes, “In jus vocari non oportet neque Consulem, neque Præfectum, neque Prætorem, neque Proconsulem, neque ceteros Magistratus, qui imperium habent, qui et coërcere aliquem possunt, et jubere in carcerem duci; nec Pontificem, dum sacra facit, nec eos, qui propter loci religionem inde se movere non possunt; sed nec eum, qui equo publico in causa publica transvehatur. Præterea in jus vocari non debet, qui uxorem ducat, aut eam, quæ nubat, nec judicem, dum de re cognoscat, nec eum, dum quis apud prætorem causam agit, neque funus ducentem familiare, justave mortuo facientem.” l. 2. Dig. de in jus voc. (2. 4). See also ll. 3. 4. hoc titulo, in which other exceptions are given, and also the words of the edict on this point: “Prætor ait: Parentem, Patronum, Patronam, Liberos, Parentes Patroni, Patronæque in jus sine permissu meo ne quis vocet.” Compare with the above, l. 8. Dig. de accus. et inscrip. (48. 2.) A plaintiff was not allowed to use

unnecessary force, and if he did so he rendered himself liable. As Rome advanced in her ideas of equity and humanity, not only were the limitations of the right already referred to introduced, but a fine for non-attendance in court was imposed as a means of compelling attendance, and in the time of Cicero "*vadimonium*," or bail, came into general use. The accused was bound over to appear *in jure* on a certain day, and if he failed the plaintiff had an "*actio ex stipulatu*" for the violation of the promise. When the defendant was thus brought into "*jus*," the plaintiff was requested to state his charge. This was termed the "*editio actionis*," and it was from this moment that the suit was actually commenced (*controversia aut lis mota*). If the defendant either could not, or would not answer the charge of the plaintiff, the magistrate might give him time, taking from him security (*vadimonium*) to appear before him again, in order to meet the action. Of the "*vadimonium*" it will be necessary to speak more hereafter.

Returning to the consideration of the "*legis actio per manus injectionem*," it is to be observed that the process had a two-fold operation. It was employed either as a method to secure actual execution against the defendant, when he was either a *judicatus* or *pro judicato*; or it was a "*manus injectio pura*."

1. The defendant might be either held as "*judicatus*" or as "*pro judicato*." In the former case the plaintiff arrested the man adjudged his debtor, and having thereupon dragged him before the *prætor*, asserted, as Gaius explains, that the defendant had treated him in bad faith. "Since you are adjudged or condemned," said the plaintiff "to give me 10,000 sesterces, which you *dolo malo* have not paid; therefore, I lay my hand on you for the said 10,000 sesterces." If then neither the debtor himself paid, nor any one for him, the creditor was entitled to take the person indebted to him, and to hold him in bonds until final proceedings were instituted against the prisoner. If, however, the debtor were disposed still further to dispute the claim

of the plaintiff, he might do so, but not in his own person. He was permitted to obtain a *vindex*, who might make himself responsible for the process, and for the payment of the money for which the defendant was held bound; in the event of the plaintiff succeeding, the *Vindex* would be liable not only for the original claim but for the double. *Fest.* "Vindex" *Gell.* 16. 10. *Gai.* iv. 171. *Cic. pro. Plan.* 21.

2. A person might also involve himself by a solemn declaration (*confessio*), asserting that he was indebted to another, the effect of which was the same as though an adjudication had taken place. In this case the defendant as *confessus* was said to be bound *pro judicato*. *Gell.* xx. 1. A defendant might be held *pro judicato* either in consequence of his having made a "confessio in jure," or as a "Nexus," or "pro lege." Any person who bound himself by means of the "nexum" was treated from the very first as "pro damnato." Among examples of the "manus injectio pro judicato," may be mentioned the "actio dependi," given by the "lex Publilia," which following the analogy of the Twelve Tables, permitted the "manus injectio," if a sponsor were not repaid the money he had advanced for the defendant within six months. The action was given to the sponsor who was entitled to claim the double. *Gai.* iii. 127. iv. 22. By the "lex Furia de sponsu" a law abolished by an "epistola divi Hadriani," an action was given against a creditor as "pro judicato," who had claimed from the sponsor more than the *virile* part. "Qui a sponsore plus quam virilem partem exegissit." *Gai.* iii. 121. 122. iv. 22. And so also the "leges Aquiliae," and indeed all actions "quæ infitiando crescunt in duplum," may be traced back to the peculiar forms of the "legis actiones" termed "per manus injectionem."

3. "Manus injectio pura," that is, not "pro judicato," should be distinguished from the "manus injectio judicati," or the "pro judicato." In the "manus injectio pura" the creditor was entitled to begin his process with an execution against the person of his debtor, but the defendant himself

was permitted to repel the “*manus injectio*” (*manum sibi depellere*) and defend his cause. This was an action that might be brought against anyone who had received as legacies, or “*donationes mortis causa*,” more than 1000 Asses; and by virtue of the *lex Marcia*, it could be employed against usurers who had allowed the process “*per manus injectionem*” to be set in motion against them in order to compel the restoration of the usurious interest they had exacted. (*Adversus fœneratores de usuris reddendis*.) iv. 23. 24. By a *lex*, the name of which is obliterated in Gaius—either the *lex Censoria* or *Plætoria*—the “*manus injectionem pro judicato*” was limited to the “*confessus in jure*,” and to the case of one for whom payment had been made (*et eo pro quo depensum est*). With these exceptions, the “*manus injectio*” was *pura*. Gai. iv. 25. 102. It is a disputed point among jurists whether the “*manus injectio*” in the “*actio furti manifesti*,” and in the “*vindicatio in servitutum*” stood in connexion with the ancient “*leges actiones per manus injectionem*.” Keller is of opinion that the latter did not, and says it is also very doubtful indeed whether the former did. Keller’s *Civ. Pro.* pp. 75—78. Puchta’s *Instit.* vol. ii. pp. 66—69. 95—100. 191—196. Heineccius *Antiq. Rom.* iv. 6. 23.

22. Postea quædam leges ex aliis quibusdam causis pro judicato manus injectionem in quosdam dederunt: sicut *lex Publilia* in eum pro quo sponsor dependisset, si in sex mensibus proximis quam pro eo depensum esset non solvisset sponsori pecuniam; item *lex Furia* de sponsu adversus eum qui a sponsore plus quam virilem partem exegisset; et denique complures aliæ leges in multis causis talem actionem dederunt.

22. Subsequently various laws on several other grounds granted the *manus injectio pro judicato* against certain persons; for instance the *lex Publilia* authorized its employment against the person for whom the sponsor had paid, if in the course of six months after the payment he had not reimbursed the sponsor; again the *lex Furia de sponsu* permitted it to be used against him who had claimed and received from a sponsor more than the virile part; and so also several other laws in many cases have granted this mode of redress.

23. *Sed aliæ leges ex quibusdam causis constituerunt quasdam actiones per manus injectionem, sed puram, id est non pro judicato: velut lex Furia testamentaria adversus eum qui legatorum nomine mortisve causa plus m assibus cepisset, cum ea lege non esset exceptus, ut ei plus capere liceret; item lex Marcia adversus fœneratores, ut si usuras exegissent, de his reddendis per manus injectionem cum eis ageretur.*

24. *Ex quibus legibus, et si quæ aliæ similes essent, cum agebatur, manum sibi depellere et pro se lege agere licebat. Nam et actor in ipsa legis actione non adiciebat hoc verbum PRO JUDICATO, sed nominata causa ex qua agebat, ita dicebat: OB EAM REM EGO TIBI MANUM INICIO; cum hi quibus pro judicato actio data erat, nominata causa ex qua agebant, ita inferebant: OB EAM REM EGO TIBI PRO JUDICATO MANUM INICIO. Nec me præterit in forma legis Furia testamentaria PRO JUDICATO verbum inseri, cum in ipsa lege non sit: quod videtur nulla ratione factum.*

25. *Sed postea lege . . . excepto a dicato et eo pro quo depensum est,*

23. But also other laws have in several cases constituted certain actions by means of the *manus injectio*, but simply (*puram*), that is to say, not by regarding the man as adjudged (*pro judicato*); thus the *lex Furia testamentaria* granted it against any one who had received as legacies or as a gift in prospect of death (*mortis causa*), more than a thousand Asses, unless he were by that law included amongst those competent to receive more; again, the *lex Marcia* granted it against money-lenders so that the process by *manus injectio* might be used against them, to compel the restoration of any usurious interest which they had exacted.

24. In the process on the ground of these and other similar laws, the defendant could repel the hand of the plaintiff and set up his own defence; for in this case the plaintiff did not add these words, "on the ground of the decree made by the judge" (*pro judicato*); but after naming the cause of the action, he added, "in consequence of this I place my hand on you," (*Ob eam rem ego tibi manum injicio*); whilst those to whom the process *pro judicato* was given, after stating the cause of action, then added, "in consequence of this I place my hand on you on the ground of the decree made by the judge (*pro judicato*)."
It does not escape my notice that in the formula of the *lex Furia testamentaria* the phrase *pro judicato* is inserted, although it is not found in the law itself: for this insertion there seems to be no reason.

25. But subsequently by the *lex* . . . it was permitted to all per-

oeteris omnibus eum quibus per manus injectionem agebatur permisum est sibi manum depellere et pro se agere. Itaque judicatus et is pro quo depensum est etiam post hanc legem vindicem dare debebant, et nisi darent, domum ducebantur. Idque quamdiu legis actiones in usu erant semper ita observabatur; unde nostris temporibus is cum quo iudicati depressive agitur iudicatum solvi satisfacere cogitur.

sons against whom the process by *manus injectio* was used, to repel the hand, and to set up a defence for himself, with the exception of any man against whom a decree had been pronounced (*judicatus*) and one for whom payment had been made. Thus the *judicatus*, and the person for whom payment was made, even after this law, were obliged to find a defender (*vindex*), and unless they did so, they were conducted to the house of the plaintiff. This custom was observed as long as the "legis actiones" were in use; hence at the present day, he against whom we employ the *actio iudicati* or *depensi* is compelled to give security that the order of the *iudex* shall be obeyed (*iudicatum solvi*).

(n) Huschke reads "Valeria," and gives its date as 413, A.U.C. Gaius in loco, *Recht des Nexum* p. 145. Boecking says that the MS. has "Vallia aut certe Vavia vel Valeia." Goeschen says, "An Villia? aut Velleia." Heffter reads "Varia." Savinius reads "Aquilina." Huschke's recent conjecture is probably the correct reading. Gneist does not venture an opinion. Rudorff also thinks that the "lex Valeria," passed under the dictatorship of M. Valerius Corvinus, is the law referred to, and that it was passed to allay the dangerous tumult of the debtors, who, goaded by their oppressions, threatened the peace of the State. See note s. to Puchta's *Instit.* vol. ii. p. 100.

26. Per pignoris capionem lege agebatur de quibusdam rebus moribus, de quibusdam lege.

26. By means of the "pignoris capio" a "legis actio," originated on account of certain claims according to custom, and others according to law.

27. Introducta est moribus rei militaris. Nam propter stipendium

27. The claim for military service (*res militaris*) was introduced by cus-

licebat militi ab eo qui distribuēbat, nisi daret, pignus capere: (c) dicebatur autem ea pecunia quæ stipendii nomine dabatur æs militare. Item propter eam pecuniam licebat pignus capere ex qua equus emendus erat; quæ pecunia dicebatur æs equestre. Item propter eam pecuniam ex qua hordeum equis erat comparandum; quæ pecunia dicebatur æs hordiarium.

tom. For a soldier was permitted to take security for his pay, from the distributor of the same, in the event of its not being paid; this money which was granted under the name of pay (*stipendium*) was called *æs militare*. Again, a soldier was authorized to take a pledge in respect of that money with which he must purchase a horse; this money was designated by the name of *æs equestre*. He could also take a pledge for the money which was necessary to purchase the barley for his horse, and this money was called fodder money, (*æs hordiarium*).

(c) The *legis actio* denominated *pignoris capio* was a mode of procedure by which the creditor was allowed to take the law into his own hands; for it empowered him to seize the property of his debtor in order that he might satisfy his legal claim. It was a method of redress permitted for military, political or religious reasons. This peculiar remedy was partly derived from custom (*moribus*), and partly from *lex*. From custom was derived the right of the soldier to seize upon the *æs militare* in the hands of the paymaster for the payment of his wages. According to Gellius, "Verba Catonis sunt: Pignoris capio ob æs militare, quod æs a tribuno ærario miles accipere debebat, vocabulum seorsum fit. Per quod satis dilucet, hanc capionem posse dici, quasi hanc capionem, et in usu et in pignore." Gell. vii. 10. Liv. 1. 43. The soldier, as we also learn from this section of Gaius, might take security for money due for the purchase of a horse (*æs equestre*), or for the horse's food (*æs hordiarium*). It was allowed by *lex* for a person to avail himself of the "pignoris capio," for the purchase of a victim (*hostia*), as it was held to be in the interest of the State that the public services of religion should be constantly maintained. See Keller's Civ. Proc. p. 80. notes 263, 265, 266. This law was no doubt as old as the time of the Twelve Tables, "De

pignoris capione adversus eum qui hostiam emit. etc.” Again, in the same spirit, the hire for a beast of burden (*jumentum*), might be obtained “per pignoris capionem,” when it was intended to appropriate the money for the purchase of a sacrifice; and by the provisions of the Twelve Tables the farmers of the public revenues (*publicani*) could avail themselves of the “pignoris capio” to secure the payment of the tribute money. These proceedings “per pignoris capionem” were *extra jus*, and might even take place in the absence of the person whose property was seized. The seizure might also be made on a *dies nefastus*, or on a day on which the “*legis actiones*” were not permitted. In regard to the sale of the object taken as security, or its redemption, there were exact rules which varied according to the nature of the different cases. There can be little doubt but that the “pignoris capio” stood in close connexion with the form of mortgage afterwards known as *pignus*, in which the thing mortgaged was actually held as a security. It seems a natural extension of the principle that a mode of security first permitted for military, political or religious reasons, should come in the course of time to be extended so as to afford security to private persons. See Keller’s Civ. Proc. pp. 79—81. Walter’s Rechts Gesch. vol. ii. 325. 326. Cic. in Ver. iii. 11. l. 1. pr. Dig. de public. (39. 4.) Smith’s Dict. Gr. and Rom. Antiq. Art. “Per Pig. Cap.” Puchta’s Instit. vol. ii. p. 100, et seq.

28. Lege autem introducta est pignoris capio velut lege xii tabularum adversus eum qui hostiam emisset, nec pretium redderet: item adversus eum qui mercedem non redere pro eo jumento quod quis ideo locasset, ut inde pecuniam acceptam in dapem, id est in sacrificium impenderet. Item lege . . . toria data est pignoris captio publicanis vectigalium publicorum populi Romani adver-

28. Now this taking of security was introduced by a *lex*; as for example, by the law of the Twelve Tables, against a man who having bought a victim, did not pay the price of it; also against him who did not pay what was due for a draught animal which had been let to him, subject to the conditions that the money thus received should be spent on provisions intended for a sacrifice.

sus eos qui aliqua lege *vectigalia* deberent.

The law (*Platoria*) also gave the *pignoris capio* to farmers of the public revenues of the Roman people as against those who, by virtue of any law, owed tribute money.

(*p*) Mommsen proposes to read *Prædiatoria*, as in Sueton. Claud. c. 9; Dirksen, *Censoria*; Huschke and others, *Platoria*; Klenze, *Thoria*. Huschke, who adopted the conjecture of Goeschen, says, "*Certe non erat Prædiatoria*," as Boecking has edited, "*vel Censoria, utraque hinc plane aliena. Itaque inter Platoria et Numitoria optio relinquitur, cum aliud hujusmodi nomen gentilitium non sit. At cum Numitorii post decemviros ante seculum septimum medium magistratus habuisse non perhibeantur et hanc legem multo vetustiore fuisse ex re ipsa efficiatur, scribendum fuit Platoria. Fuerit ejusdem M. Platorii tr. pl. (ut putant A.U.C. 388), qui et aliam judiciarum legem tulit.*" *Censorin. 24. Varro de Ling. Lat. 6. 1. 5.*

29. Ex omnibus autem istis causis certis verbis pignus capiebatur; et ob id plerisque placebat hanc quoque actionem legis actionem esse. (*q*) Quibusdam autem non placebat: primum quod *pignoris capio* extra jus peragebatur, id est non aput Prætorem, plerumque etiam absente adversario, cum alioquin ceteris actionibus non aliter uti possunt quam aput Prætorem præsentem adversario: præterea nefasto quoque die, id est quo non licebat lege agere, pignus capi poterat.

29. In all these different cases the *pignoris capio* was accompanied by a certain form of words; and consequently most have thought that this process was a *legis actio*; but this opinion was not acceptable to certain authors; first because the *pignoris capio* was completed from beginning to end *extra jus*, that is to say, not in the presence of the Prætor and even generally in the absence of the opposing party, whilst the other *legis actiones* could only be carried on before the Prætor, and in the presence of the opposing party; moreover, the *pignoris capio* could be performed on a *nefastus dies*, that is to say, at such times as it was not permitted to proceed by the *legis actio*.

30. *Sed istæ omnes legis actiones paulatim in odium venerunt. Namque ex nimia subtilitate veterum qui tunc jura condiderunt eo res perducta est, ut vel qui minimum erasset litem perderet. Itaque per legem Æbutiam et duas Julias sublatae sunt istæ legis actiones effectumque est, ut per concepta verba, id est per formulas litigarem.*

30. But all these *legis actiones* fell gradually into discredit: for, in consequence of the too great subtlety of the ancient founders of our laws, so much nicety was required, that the least error vitiated the process. Consequently these *legis actiones* were superseded by the *lex Æbutia*, and the two *leges Juliae*, so that now legal process is conducted in prescribed words, that is to say, by means of the *formula*.

(q) The “*legis actiones*” were found in the course of time to be unsuitable to the advanced condition of the Roman people, whilst the exact formalities required in so dramatic a mode of procedure, not only imperilled, but often frustrated the ends of justice. This consequently led, not at once, but in course of time, to a radical and entire change in the method of administering justice, by the introduction of the system of civil process termed the “*Formula*.” This was a written proceeding introduced by the *lex Æbutia* and the *leges Juliae*, by virtue of which, as Gaius says, the process was conducted “*per verba concepta*,” that is to say, “*per formulas*.” By the *lex Æbutia*, a law probably passed in the sixth century of the State, an alteration was made, in consequence of which the process by the *legis actiones* became at first exceptional, whilst the process with the *formulae* or *per concepta verba* became the usual mode of procedure. What those actions were which still continued to be prosecuted by the *legis actiones* is not with certainty known. Dr. Goldschmidt is of opinion that after the *lex Æbutia* there was a “*sponsio præjudicialis* ;” that the litigants went before the prætor, and that the defendant became bound to the plaintiff by the formal words, “*Spondesne ? Spondeo*.” The effect of this was that if the *actio* was decided in favour of the plaintiff, the defendant lost the sum of money he had promised by the stipulation. This change in legal procedure had taken place long before the time of

Cicero, and its effect was without doubt to supersede entirely certain forms of action, as for example, the "*legis actio per condictionem*." In some cases, however, the *legis actio* was still retained as more suitable to judicial procedure. See Puchta's *Instit.* vol. i. p. 338. Keller p. 86.

The two "*leges Juliae*," probably the "*leges judicariæ*" of Augustus, had the effect of still further limiting the "*legis actiones*." Yet even the extent of this limitation is not exactly known. It is probable that the college of the *Decemviri* as an independent judicial tribunal was abolished by these enactments, and that the sphere of the operation of the *centumvires causæ* became still further limited. Gaius says that after the passing of these laws, the procedure by *legis actiones* was only permitted in two cases:—on account of *damni infecti*, and in suits before the tribunal of the *Centumviri*. iv. 31. The investigation in the case of *damnum infectum* appears to have taken place before the *prætor urbanus*. In the time of Gaius the "*legis actiones*" were still further limited, for it was now only in *causæ centumvires* that the "*legis actiones*" were used. The new process, *per formulas*, was employed in all cases where matters were investigated before private judges, and consequently "*agere per formulam*," or in "*concepta verba*," and the new or classical process, as it is now termed, became identical from the end of the Republic until the reign of Diocletianus.

The essence of the proceeding by the formula consisted in this: that in the place of solemn words and pompous transactions before the magistrate, there was substituted a simple unilateral writing before the *prætor*, in a set or prescribed form of words (*in concepta verba*). This formula contained in the first place, the name or names of the *Judex* or *Judices*, or of the *Arbitri*, or of the *Recuperatores*, as the case might be. Thus, it commenced "*Lucius Titius judex esto*." The formula then contained instructions for the judge, in which the controversy between the suitors was briefly set forth, and the *judex* was instructed to end the controversy by pronouncing his sentence. As the rule, the judge

was instructed either to condemn the defendant, or to acquit him :—"Si paret condemna :—Si non paret absol-ve." The effect of these precise directions which had been carefully prepared in the court of the Prætor was to inform the judge beforehand, as to the question to which he was to direct his attention, and upon what points he was required to adjudicate. In many cases the Judex had simply to decide upon matters of fact, whilst in others he had to determine points of law. Thus, supposing certain facts to exist, he had sometimes to determine their legal effect. Whilst, however, this latitude was permitted in certain cases, in others he was strictly limited by the words of the formula. He might often have to decide such a simple question of fact as the following: had the defendant entered into the house of the plaintiff, and did he intend to take the property of the plaintiff in violation of the law. Such, for instance, would be the points submitted in an action of theft (*furtum*). The preparation of the formula took place *in jure*, and the object of the prætor was to prepare it in such a way as to secure substantial justice between the litigants. Both parties had audience before the Prætor, but their words were informal and not ritualistic as in the "legis actiones." The object of the defendant would of course be, if possible, to prevent the interference of the magistrate, and to strive that the plaintiff should secure a formula as unfavourable to his suit as possible.

It is obvious that the effect of the process by the formula, must have been to augment the influence of the presiding magistrate, and to add greatly to the importance of the court of the Prætors. Under the "legis actiones," the hands of the magistrate, as we have already seen, were bound. He was compelled to sit passive, and could neither choose, nor prevent the litigants from adopting a certain mode of procedure. All was now changed, for it was in the power of the Prætor to investigate every claim that might be submitted for his consideration, and by yielding to the application of the plaintiff for a formula, or by his refusal, he kept it in his

own power to decide whether the claim of the plaintiff should be allowed to be prosecuted, or whether he should be non-suited. The magistrate could also, during his year of office, establish new rules of law, and supersede those already in existence. Thus, in the action given to the *publicani*, referred to in Gaius, by the employment of a fiction under the sanction of the prætor, means were found to secure the condemnation of the defendant. Gai. iv. 32. The magistrate could not directly change the *jus civile*, but he could operate upon it indirectly by means of his edict. It was an essential and indeed vital part of the prerogative of the principal magistrates—the “magistratus populi Romani” as they are called—that they should possess and exercise the *jus edicendi*. This authority belonged to the Prætors, to a certain extent to the Ædiles at Rome, to the Proprætors, and to the Proconsuls in the Provinces. The Quæstors enjoyed in the Provinces the same authority and discharged the same functions as the Ædiles at Rome. Gai. i. 6. Instit. Rom. Law. tit. iii. sec. 7. p. 47. et seq.

In some cases the magistrate gave an entirely new formula, whilst in others, his formula was an extension of the *jus civile* or contained simply a repetition of the edicts of his predecessor. For instance, in the case of the “*actio empti*,” according to the *jus civile*, the vendor in the case of fraud (*dolus*) was made liable by the law of the Twelve Tables in *duplum*. Thus Paulus says, “*Res empti mancipatione et traditione perfecta, si evincatur, auctoritas venditor duplo tenus obligatur.*” Recep. Sent. ii. 17. 3. The Ædiles extended this principle of the *jus civile*, and held the vendor liable for certain defects in slaves, cattle and animals, unless they were pointed out at the time of the sale. For this purpose they gave the “*judicium redhibitorium*” to compel the vendor to take back the thing, and to restore the money paid for it within six months; and also the “*judicium æstimatorium sive quanti minoris*,” within a year for a reduction in the price. l. 1. s. 1. l. 38. pr. Dig. de edic. (21. 1) Cic. de Offic. iii. 17. At the commencement of his year of office every

magistrate possessing right to promulge legal rules put forth his edict, and in certain cases adopted those of his immediate predecessor. Each Prætor made his own rule, which as far as he was concerned had the force of law (*lex*). Hence Cicero says, "*legem annuam dicunt esse.*" Cic. Ver. 1. 42. When, however, the prætorian edict was found to contain principles and rules that were likely to be permanently useful, his successor was at liberty to adopt and to embody them in his own edict (*edictum tralatitium*). Instit. Rom. Law. pp. 50. 51. l. 7. s. 1. Dig. de jus et jur. (1. 1). Hence this great magistrate had power to declare that in certain cases during his year of administration, he should require or give "cautio," or "exceptiones," or "interdicts," or the "in integrum restitutio." In this way he laid down the legal principles upon which he intended to conduct his administration. Vast as this power undoubtedly was, these magistrates did not abuse their "imperium," but by its exercise built up the noblest system of jurisprudence that the world has ever seen. | An example or two must suffice to explain and illustrate how this prerogative was exercised: "*Verba autem edicti talia sunt. Quæ dolo malo facta esse dicentur, si de his rebus alia actio non erit, et justa causa esse videbatur, judicium dabo.*" Again, "*Ait prætor, quod, metus causa questum erit, ratum non habeto.*" Again, "*Ait prætor si quis negotia alterius, sive quis negotia, quæ cujusque, cum is moritur, fuerint gesserit, judicium eo nomine dabo.*" l. 1. s. 1. Dig. de dolo mal. (4. 3) l. 1. Dig. quod met. (4. 2) l. 31. pr. de neg. gest. (3. 5). The words of the prætors in their severe simplicity, exhibit at once the manner in which these officers of the State used their authority for the advancement of justice, without ever coming into collision with the *jus civile*, or violating the peculiar and fundamental laws of their country.

This wise and beneficial exercise of power, and the facilities afforded for the administration of justice by the use of the "formulæ," no doubt speedily increased the power and influence of the Prætors, as well as of the inferior and provincial

magistrates who were possessed of a similar "imperium" and also of a "jurisdictio." The edicts which the Prætors published were sometimes general, at other times special. Again they were at times based upon a *legally* acknowledged right, or upon a right which the magistrate deemed proper to respect. Thus it is easy to see that the Roman magistrate whilst he was under a weighty obligation, had a power at his command which enabled him to adapt the laws of his country to the important exigencies of the nation, to its advancing ideas, as well as to its abstract sense of justice. The actions given by the "jus civile" were said to be "legitimæ," or "civiles." Those given by the magistrates were denominated "actiones honorariæ," and were divided into "actiones prætoriæ," or "ædiliæ." s. 13 Instit. de act. (4. 6) l. 25. s. 2. Dig. de obl. (44. 7). It is conjectured that the redaction of the "actiones honorariæ" took place in a twofold manner. The Prætor added a rider to an "actio civilis," as in the "actiones fictitiæ" in which a civil action was feigned, and the judge was instructed to decide, as if the plaintiff were entitled by the "jus civile." For instance, in order for the vindicatio to succeed there was required a "justus titulus," and the plaintiff must be able to claim the property "ex jure Quiritium," as it was only this that could give the right to the employment of the "in rem actio." If the plaintiff could not prove this, it was in vain for him to proceed with his suit. In such a case the Prætor interposed his authority, and instructed the judge to adjudicate the property to the suitor who had the better right. Of this kind was the "actio Publiciana," named after the prætor Publicius, "quoniam primum a Publicio prætore in edicto proposita est." s. 4 Instit. de action. (4. 6.) Thus upon the fiction of a completed usucapion, the owner who had lost his possession of a thing, was enabled to secure for himself all the material advantages of the vindicatio. Gaius gives us an example of this action in the case of a slave, the possession of which the owners had lost. "Judex esto. Si quem hominem Aulus Agerius emit, etc." s. 36. Or to take another example of the way in

which the prætor interposed his authority. When a man or a woman suffered a "*capitis deminutio*," they ceased to be bound by the *jus civile*. For this case the prætor introduced an *actio utilis*, of which we will speak presently, in order to nullify to a certain extent the change of Status, that is to say, he restored the lost right of action by the introduction of a fiction, proceeding upon the supposition that neither the man nor the woman had suffered the "*capitis deminutio*." Gai. iv. ss. 34—38. Keller's Civ. Proc. pp. 116—122. For remarks pointing out similar fictions in English procedure see Rüttmann Eng. Civ. Proc. ss. 57. 68. 73. cited in note 338 of Keller.

Another important application of the authority of the Prætor was that when a right of action was given by the *jus civile* to or against a person, the Prætor in his formula might direct the Judex to pronounce his judgment against or in favour of some *third* person. For instance, if anything were due to a former owner, or if he himself were indebted, the action could not be brought against the owner for the time being who had acquired either by the *bonorum possessio* or by purchase. No legal liability attached to him. Hence the only mode of procedure was by an *actio utilis*, (Gai. iii. s. 81.) and the bonorum emptor was compelled to sue by a fiction as if he were heir; or he demanded that the defendant might be condemned to give to him as purchaser *in the name of the seller*. When the bonorum emptor sued under the fiction that he was heir, the procedure was termed the *actio Serviana*. When he conducted his suit in a way to obtain a condemnation in the name of the seller, the action was called *Rutiliana*, as it was originally introduced by the Prætor Publius Rutilius. Gai. iv. s. 35. Let us take another example in which a third person might be condemned. By the prætorian law the *exercitor navis*, that is, the person to whom all the ship's earnings belonged (*obventiones et reditus*), whether he were the owner of the vessel, or merely the person who chartered it, was liable for the debts which the *magister navis*, or the captain, had con-

tracted within the circle of his duties. In this action, which was termed *exercitoria*, the Prætor gave the following formulæ: "Si paret Titium Magistrum Augerio, etc. X. M. dare oportere, Judex *Negidium* exercitorem Augerio, etc. X. M. condemna. Si non paret absolve;" or thus: "Quod Augerius Titio magistro M. medimnos tritici vendidit, etc. Quicquid ob rem Titium Augerio dare facere oportet ex fide bona, ejus *Negidium* Augerio condemna, etc." Keller Civ. Proc. pp. 122, 123. Thus it was not only the captain of the ship or the supercargo that was bound; since the action might be brought for the condemnation of a third person. In effect, the formula said: "If it be found that Titius, the captain of the vessel, is indebted to Augerius, then Judex condemn in this action not Titius, but Negidius, the owner of the vessel, or the party who has chartered it to the plaintiff, Augerius." Matters of fact were set out upon which to found a civil claim, and then if the action could not be maintained by the *jus civile*, the judex was instructed to inquire into the special circumstances in the concrete case in order to ascertain their truth or their falsity; and according to the result of his investigation either to condemn or to absolve. Thus, the Prætor might instruct the judge to investigate whether 1000 were due according to the *jus civile*, and if the judge found that the money was really owing, but that it could not be claimed *ex jure civile*, the power of the Prætor enabled the judge to remit the strict law, and to decide according to the rule laid down in the formula. In a similar manner by the edict of the Prætor an action was given against the father or the master, who might be declared liable for his son or his slave, and the words *quod jussu* were added, when the thing had been done by their command. The expression "adjecticia qualitas" was also employed when a thing was done by one party in obedience to the order of another, and the actions given by the prætor were named "actiones adjecticiæ qualitatis." l. 5. pr. Dig. quod jussu (15. 5). Puchta's Instit. vol. iii. p. 55. When actions were conceived in a free form, they

were termed "*actiones in factum*," or "*in facta concepta*," in opposition to "*actiones fictitiæ*," or "*in jus conceptum*." Thus, in the *actio Publiciana*, "*Si quem hominem A. A. emit et is ei traditus est, anno possidisset, tum si eum hominem de quo agitur ejus ex jure Quiritium esse oporteret, etc.*" Such actions, as Gaius says, are "*actiones quæ ad aliam actionem exprimuntur*," and the pattern upon which they were fashioned might have been either the *legis actio* or any other. Puchta's *Instit.* vol. ii. p. 127. But sometimes the Prætor gave actions both *in factum* and *in jus conceptæ*, examples of which Gaius gives in the forty-seventh section of this book. The actions *in factum*, however, are not to be confounded with the actions *in prescriptis verbis*, "*Quæ ex bona fide oritur*."

Finally, a most important extension of the *actio* as far as obtaining the ends of justice was secured by means of what was denominated the "*actiones utiles*." These actions were given by the edict, as Papinianus says, "*quoties deficit actio vel exceptio, utilis actio vel exceptio est*." l. 12. Dig. de præs. verb. (19. 5). An *actio utilis* was framed on some analogy suggested by an action *ex jure civile*. Thus, if any one claimed on the ground of the edict relating to the "*bonorum possessio*" proceeding under the fiction that he was the heir he succeeded in the place of the deceased according to the prætorian law, and not according to the *jus civile*. See the formula for this case, Gai. iv. 34. An *actio utilis* might also arise from analogy. Thus, the "*actio ex leges Aquiliæ*" was originally confined to the killing of cattle or slaves; but by analogy, it was extended to a great number of other cases. In some instances the *utilis actio* was promulged by the edict, or by an adaptation of the words of the formula, or by fiction, or by a "*conceptio in factum*." In the "*Serviana actio*" the "*bonorum emptor*" sued *fictio se herede*, and the action given to him by the Prætor was a *utilis actio*. Hence it has been called a "*utilis vindicatio*," or the "*quasi vindicatio Serviana*." It was not every *utilis actio* that was an "*actio in factum*," many indeed were

"in *jus conceptum*." Again, every *utilis actio* was not *fictitia*, although every *fictitia actio* was *utilis*. The normal *actio* was called the *actio* "*directa*" or "*vulgaris*." In ordinary cases the magistrate gave the formula as he found it inscribed in his album. When, however, it was deemed to be inapplicable to the case of the plaintiff, and when the Prætor felt that it would be for the interests of justice that the plaintiff should have relief, he might make the necessary alterations in the formula, and thus an action, not strictly applicable, was rendered available and useful. This will explain what Ulpianus says. "*In quibus igitur casibus lex deficit, non erit nec utilis actio danda.*" That is to say, the "*utilis actio*" was only given when the *existing* law was not immediately applicable. l. 64. s. 9. Dig. de impensis in res dat. fac. (25.1) l. 24. Dig. de hered. instit. (28.5). l. 27. s. 1. Dig. de proc. et def. (3.3). l. 11. s. 10. ll. 12. 13 Dig. ad leg. Aquil. (9.2.) Keller's Civ. Proc. Cap. sechtes, p. 370. Instit. Rom. Law. ss. vii. viii. pp. 47—60.

31. *Tantum ex duabus causis permissum est lege agere: damni infecti, et si centumvirale judicium fit. Proinde vel hodie cum ad centumviros itur, ante lege agitur sacramento aput Prætores urbanum vel peregrinum. Propter damni vero infecti nemo vult lege agere, sed potius stipulatione quæ in edicto proposita est obligat adversarium per magistratum, quod et commodius jus et plenius est. Per pignoris apparet. (r)*

31. The procedure by *legis actio* was only permitted in two cases; on account of *damni infecti*, and if the case were before the tribunal of the Centumvirs. When an action ought to be carried to the tribunal of the Centumvirs, formerly, as at the present time, the *legis actio sacramenti* was employed either before the *Prætor urbanus* or the *Prætor peregrinus*. But in the case of *damnum infectum* no one wished to proceed by the *legis actio*, but rather by the stipulation set forth in the edict which bound the defendant by the power of the magistrate and gave a right more convenient and effective.

(r) The college of the Centumviri preserved the ancient form of procedure *per sacramentum* in matters of real right. Gai. s. 95. But in the case of *damnum infectum*

the Prætor had recourse to the "cautio infecti." See p. 589 et seq. Gneist says "in pag. lxxviii. Cod. Ver. quæ sequitur nihil legi potest. Gaius certe de formulis agebat quæ ad legis actionis fictionem exprimuntur." Compare Gai. iv. s. 10. Domenget in loco and also on ss. iii. 78 and 96.

32. Item in ea forma quæ publicano proponitur talis fictio est, ut quanta pecunia olim, si pignus captum esset, id pignus is a quo captum erat luere deberet, tantam pecuniam condemnatur.

32. Again in the formula given to a *publicanus* a fiction of this kind was employed, so that the defendant was condemned in such a sum as he from whom the party had formerly taken a pledge would have paid, if he had wished to regain it.

33. Nulla autem formula ad conditionis fictionem exprimitur. Sive enim pecuniam sive rem aliquam certam debitam nobis petamus, eam ipsam dari nobis oportere intendimus; nec ullam adjungimus conditionis fictionem. Itaque simul intellegimus eas formulas quibus pecuniam aut rem aliquam nobis DARE OPORTERE intendimus, sua vi ac potestate valere. Ejusdem naturæ sunt actiones commodati, fiduciæ, negotiorum gestorum et aliæ innumerabiles. (s)

33. But no formula was given as a fiction for the *condictio*. For if we claim a sum of money or any other certain thing that is due to us, we assert that that very thing ought to be given to us (DARI NOBIS OPORTERE) nor do we join any fiction on the *condictio*. Hence we perceive at once that those *formulae* in which we maintain that the defendant ought to give us money or some other thing, avail by their own force and power. Of this nature are the *actiones commodati, fiduciæ, negotiorum gestorum* and innumerable others.

(s) Whilst students of the Roman Law are in the habit of drawing sharp lines of distinction between the ancient mode of Civil process denominated the "legis actiones," and the more recent "per formulas," there can be no doubt that the change from the one to the other was not sudden, but that it was gradual, and passed through several stages. When we say that the change took place upon the passing of the "lex Æbutia" and the two "leges Juliæ," all that we are to understand is, that these were great landmarks which clearly marked out progress in Roman legal history,

far as Civil Process was concerned. Gaius tells us in this book that certain actions under the *formulae* were derived from the "legis actiones." "Quædam," says he, "præterea sunt actiones quæ ad legis actionem exprimuntur." s. 10. He could scarcely have used a word more expressive than "*exprimo*" to emphasize the truth of this observation. Doménet observes that Gaius has given us as an example of an action *per formulam* derived from the *legis actio*, the action given to the *publicani*, in which the fiction consisted in the following: that the debtor was condemned in such a sum as under the former procedure he would have had to pay if he had wished to regain his pledge. Gai. iv. 32. Unfortunately the passage in which the commentator presented and explained the relation that subsisted between the two systems of procedure is lost; but whilst it is difficult to fix upon distinct details, it is by no means impossible to trace a close bond of connexion between the *formulae* and the *legis actiones*. For instance, the *sponsio* under the formula possessed the same penal character as the *sacramentum* under the "legis actio sacramento," the plaintiff lost the amount stipulated for, if his provocation proved to be unjust; and on the other hand, the defendant as we have already seen, was mulcted in the amount of the *restipulation* if he failed in his suit. One point which marks divergence and change, is worthy of notice; namely, that whilst under the "legis actio sacramento" the *sacramentum* was forfeited to the *Ærarium*, the sum secured by the *sponsio* was gained by the party that succeeded in the action. This connexion between the two systems may also be traced in the similarity between the language employed in the court of the Prætor by the litigants at the time of the *legis actiones*, and the words written by the magistrate in the formula. Thus, in the first system, the claimant of the slave said, "Hunc ego hominem meum esse aio." We find almost the same words in the *intentio* of the formula:—"Si paret hominem ex jure Quiritium Auli Agerii esse." Huschke is of opinion that the object also of the *intentio* in the formula, of which we shall speak

hereafter, stood in close connection with what is implied in the term *ais*, in the formal language employed under the *legis actio*. Again, under the formula we have the expression, “*Quod Aulus Agerius hominem vendidit*,” and in the “*actio legis per manus injectionem*” we find the words used were “*Quod tu mihi judicatus sive damnatus es*.” See ss. 21, 24, 40. Huschke's *Kritik*. note to *Gaius* iv. 41. *Domenget*, pp. 497. 498.

Again, in the process between *peregrini*, or between Roman citizens and *peregrini*, the magistrate did not name a single *iudex* to examine the matters inserted in the formula, but several, as we have already seen, named *Recuperatores*. See note to iv. 1. p. 593. Since these judges had not to decide upon questions of law, but simply on questions of fact, it follows that the formula needed only to contain two parts, namely, one in which the facts should be stated, which were required to be examined, and another in which the *prætor* gave the power either to condemn or to absolve. These are precisely the points that we find in the “formula in factum.” This simplicity of procedure before the *Recuperatores* possibly attracted the notice of the citizens of Rome, and induced them to solicit the magistrates to allow them to participate in a mode of procedure as simple and as speedy as that enjoyed by the *peregrini*. *Zimmern* thinks that the *intentio*, and the *demonstratio* in the actions *per formulas* had their origin and their type in the *legis actiones*, and that the actions *in factum* were formed in imitation of the *formulæ* employed by the *peregrini* under the system of the *legis actiones*. *Domenget*, pp. 498. 500.

34. *Habemus adhuc alterius etiam generis fictiones in quibusdam formulis: velut cum is qui ex edicto bonorum possessionem petit ficto so herede agit. Cum enim prætorio jure et non legitimo succedat in locum defuncti, non habet directas actiones, et neque id quod defuncti fuit potest*

34. We have yet fictions also of another kind in certain *formulæ*: for example, when a party has claimed on the ground of the edict relating to the *bonorum possessio* proceeding under the fiction that he is the heir. For since he succeeds in the place of the deceased according to *prætorian*

intendere suum esse, *neque id quod defuncto debebatur potest intendere dare sibi oportere*; itaque ficto se herede intendit veluti *hoc modo*: "Judex esto. Si Aulus Agerius," id est ipse actor, "*Lucio Titio heres esset, tum si paret fundum de quo agitur ex jure Quiritium ejus esse oportere*;" vel si *in personam agatur*, præposita similiter *fictione illa (t)* ita subicitur: "Tum si paret Numerium Negidium Aulo Agerio sestertium x milia dare oportere."

right and not according to the civil law (*legitimo*) he has no direct action and he cannot claim by the *intentio*, that the property of the deceased was his own (*suum esse*), nor can he thus assert that what was owing to the deceased ought to be paid to him, therefore he claims by a fiction as heir in the following manner, "Let there be a judge. If Aulus Agerius," the plaintiff "be indeed heir to Lucius Titius, then if it be so established that the property in litigation ought to be his by Quiritarian ownership;" or if he proceed by an action *in personam* then a similar fiction is employed, "If it so appear, that Numerius Negidius ought to give ten thousand *sesterces* to Aulus Agerius."

(t) This is Scheurl's reading. Hollweg would read "tunc." Huschke approves of Heffter's conjecture and reads "intentio." Another emendation gives "formula," but the marks in the MS. point to "illa" as the true reading.

35. Similiter et bonorum emptor ficto se herede agit. Sed interdum et alio modo agere solet. Nam ex persona ejus cujus bona emerit sumpta intentione convertit condemnationem in suam personam, id est ut quod illius esset vel illi dare oporteret, eo nomine adversarius huic condemnatur; qua species actionis appellatur Rutiliana, quia a Præatore Publico Rutilio, qui et bonorum venditionem introduxisse dicitur, comparata est. Superior autem species actionis qua ficto se herede bonorum emptor agit Serviana vocatur. (u)

35. In like manner also the *bonorum emptor* sues by a fiction as if he were heir. But sometimes he sues in a different manner. For having assumed the *intentio* belonging to the person whose property he has bought, he converts the *condemnatio* to himself; that is to say, he demands that the defendant may be condemned to give to the purchaser whatever was the property of the seller, or ought to have been given to him; which species of action is called *Rutiliana* because it is said to have been introduced by the *prætor Publicus Rutilius*, who also introduced the *bonorum venditionem*. Now the first kind of action by which the *emptor bonorum* sues under the fiction of being heir is called the *actio Serviana*.

(u) When the action given by the Prætor reposed upon a fiction, as in the case presented in the text, it was called an “*actio fictitia*.” When the prætor gave an action by adapting a formula already prepared for some case for which the law gave relief, to another case unprovided for by the *jus civile* the action was termed *utile*, in contradistinction from that which was named *directa*. Such an application of what may be denominated the normal action, might take place both in civil and prætorian actions. Hence we find the “*actio utilis legis Aquiliæ*,” in which there was the extension of a civil action ; and the “*interdictum utile uti possidetis*,” which presents an example of the extension of a prætorian action. l. 7. pr. s. 1. Dig. de relig. et sumtib. (11. 7) s. 16. Instit. de leg. Aquilia (4. 3.) “*Si usufructum legato legatarius fundum nactus sit, non competit interdictum adversus eum, qui non possidet legatum, sed potius fruitur. Inde et interdictum UTI POSSIDETIS utile hoc nomine proponitur (et) UNDE VI, quia non possidet. Utile hoc interdictum tali formula concipiendum est: ‘Quod de his bonis legati nomine possides, quodque uteris frueris, quodque dolo malo fecisti, quominus possideres, uteris frueris.’*” Vat. Frag. 90. We see by the text that the “*actio Publiciana*,” was not the only fictitious action given in case of bonitarian ownership ; but that there was the fiction of the “*bonorum possessor*,” as well as the case in which the bonitarian owner employed the *vindicatio* even without a fiction, by means of a *cognitor* or a *procurator*. Gaius. iv. 35. This principle of representation played an important part in Roman law, and after the idea of legal fiction became permanently fixed in the mind, we know that it was turned to good account. Thus the *heres*, as the representative of the defunctus, could bring an action by virtue of his feigned connexion with the dead : “*id quod defuncti fuit, suum esse, id, quod defuncto debebatur, dari sibi oportere.*” Before this principle of representation was fully recognised, suitors were helped in their claims by means of “*adstipulatores*” and “*adpromissores*,” that is, by “*sponsores*,” and “*fideprom-*

missores." When, however, by the aid of legal fiction representation came to be admitted in civil process, adstipulatio ceased, except in the case mentioned by Gaius, iii. 117. "Cum ita stipulamur, ut aliquid post mortem nostram, detur." See Puchta's *Instit.* vol. ii. pp. 51. 52, and the note *c* by Rudorff. Domenget in loco.

36. *Ejusdem generis est quæ Publiciana vocatur.* Datur autem hæc actio ei qui ex justa causa traditam sibi rem nondum usucepit eamque amissa possessione petit. Nam quia non potest eam ex jure Quiritium suam esse intendere, fingitur rem usucepisse, et ita, quasi ex jure Quiritium dominus factus esset, intendit hoc modo: "Judex esto. Si quem hominem Aulus Agerius emit, et is ei traditus est, anno possedisset, tum si eum hominem de quo agitur ejus ex jure Quiritium esse oporteret et reliqua." (*v*)

36. Of the same kind is the *actio* called *Publiciana*, but this action is given to him who has not yet attained the right of *usucapio* in a thing delivered to him *ex justa causa* and who having lost possession claims it. For as he cannot claim the thing to be his *ex jure quiritium*, so by a fiction it is pretended that he has the right by *usucapion*, and he then claimed as if he had become owner *ex jure quiritium* in the following manner—"Let there be a judge. If Aulus Agerius has bought this slave, and he to whom the slave has been delivered has possessed him for a year, then if that slave in regard to whom the suit is brought, ought to be his property *ex jure quiritium*, and so on."

(*v*) The Prætor Publicius gave an *actio* by which the judge was directed to proceed in his investigation, and to decide as if the *usucapion* were already accomplished. The words of the edict are as follows: "Ait Prætor: si quis id quod traditur ex justa causa non a domino et *nondum usucaptum* petet, judicium dabo." 1. Dig. de Public. u. rem actio. (6. 2.) To which Ulpianus adds, "Merito Prætor ait *nondum usucaptum*; nam si *usucaptum* est, habet civilem actionem, nec desiderat honorariam."

37. Item civitas Romana peregrino fingitur si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est, si modo justum sit eam actionem etiam ad peregrinum extendi, velut si furtum faciat pere-

37. Again by a fiction the Roman *civitas* is given to a *peregrinus*, when he sues or is sued as such in the case where the action is conferred by our law, provided the extension of that action to a *peregrinus* is legally admis-

grinus et cum eo agatur, formula ita concipitur: "Judex esto. Si paret *ope* consiliove Dionis Hermæci Lucio Titio furtum factum esse pateræ aureæ quam ob rem eum, si civis Romanus esset, pro fure damnum decidere oporteret et reliqua." Item si peregrinus furti agat, civitas ei Romana fingitur. Similiter si ex lege Aquilia peregrinus damni injuriæ agat aut cum eo agatur, ficta civitate Romana judicium datur. (*w*)

sible; as for example, if a *peregrinus* has committed a *furtum*, and if one sue him, the *formula* is thus conceived—"Let there be a judge. If it appears that by the counsel or aid of Dion Hermæus, a *furtum* has been committed by Lucius Titius of a golden bowl, for which if he were a Roman citizen he ought to be condemned as a thief, and so on." Again, if sued for a *furtum* he is supposed by a fiction to be possessed of the Roman *civitas*. Again if a *peregrinus* sue, or be sued for *damni injuriæ* on the ground of the *lex Aquilia*, a *judicium* is given under the fiction that he has the *civitas*.

(*w*) There was a period at Rome when *non cives* were held to be devoid of that capacity which could alone entitle them to the protection of the courts of justice. This state of things was modified at an early period by treaties with foreign States, and by the incorporation of other cities or political associations into the Roman family, without, however, their attaining to the full privileges conferred by the *civitas*. In this way *non cives*, if they were free, came to be regarded as fit for the enjoyment of certain legal rights. Still there was a wide gulf between the Roman citizen and these new members of the commonwealth. They lacked not merely full political rights, but also the privileges of the *jus civile* which were kept from them as "*proprium jus civium Romanorum*." In time, however, they came to be regarded as fit subjects for the protection afforded by the *jus gentium*. The *peregrini*, regarded as *non cives*, stood in the most complete opposition to the "*cives Romani*." By the term *peregrini*, is to be understood not only the denizens of foreign States, but also the people who lived immediately around Rome itself. The correct idea to attach to the *peregrinus* is, that he was simply a *non civis*, that he was neither entitled to the advantages of the *commercium*, nor enjoyed those of the *connubium*. See Gai. i. 5. 6. In the course of time

many of the *peregrini* without attaining the *civitas*, were allowed to avail themselves of the privileges of the *commercium*, so far as to enable them to acquire property according to the “*jus Quiritium*,” with its peculiar privileges; to contract Roman obligations, and partly or entirely to exercise the “*testamenti factio*.” Thus, Ulpianus says, “*Mancipio locum habet inter cives Romanos et Latinos Junianos eosque peregrinos, quibus commercium datum est.*” Frag. xix. 4. xx. 14. Cic. pro Archia 5. Again, the *connubium*, or the privilege of contracting a Roman marriage, and of enjoying certain family relations, was granted by special concession. Thus, Ulpianus says, “*Connubium habent cives Romani cum civibus Romanis, cum Latinis et peregrinis ita, si concessum sit.*” Frag. v. 4. For the most usual case in which this privilege was granted, see Gai. i. 57. The veteran also discharged from military service was privileged in the same manner. “*Veteranis—honestam missionem et civitatem dedit, quorum nomina subscripta sunt, ipsis, liberis posterisque eorum, et connubium cum uxoribus quas tunc habuissent, cum est civitas iis data, aut si qui cœlibes essent, cum iis quas postea duxissent dumtaxat singuli singulas.*” Haubold opusc. ii. p. 852. et seq. The wives, however, of such veterans remained *peregrinæ*, whilst the marriage contracted was deemed to be a Roman marriage with all its legal consequences in regard to the children. Compare Savig. Sys. ii. 41. et seq. Gradually the disabilities under which the *peregrini* were placed were relaxed, so that many of the privileges of the *jus civile* were declared to be available to them by law; or the prætor by his formula, aided by legal fiction, so managed that many of the laws *ex jure civili* were pronounced to be applicable to their case. The text affords a striking illustration of this fact. See Puchta’s Instit. vol. i. 471. et seq.

38. Præterea aliquando fingimus adversarium nostrum *capite* diminutum non esse. Nam si ex contractu

38. Moreover, in some cases we assume by a fiction that our adversary has not suffered a *capitis* demi-

nobis obligatus obligatave sit et capite deminutus deminutave fuerit, velut mulier per coemptionem, masculus per adrogationem, desinit jure civili debere nobis, nec directo intendere possumus dare eum eamve oportere: sed ne in potestate ejus sit jus nostrum corrumpere, introducta est contra eum eamve actio utilis, rescissa capitis deminutione, id est in qua fingitur capite deminutus deminutave non esse. (x)

nutio. For if either a man or a woman under an obligation to us shall have suffered a *capitis deminutio*, as, for example, a woman by *coemptio*, a man by *adrogatio*, they cease to be bound to us by the *jus civile*, nor can we claim directly that he or she ought to give. But that it may not be in their power to destroy our right, an *actio utilis* was introduced against them in order to nullify the *capitis deminutio*, that is to say, an action in which by a fiction neither the one nor the other is regarded as having suffered a *capitis deminutio*.

(x) When an obligation was destroyed by “*capitis deminutio*,” it was only the *civil* bond that was dissolved; the natural obligation, though ineffective “*ex jure civili*,” was preserved. “*Naturalis obligatio manet*.” See the remarks of Gaius upon this point in iii. 84. We learn from the text that if a “*minima capitis deminutio*” were suffered, an “*utilis actio*” was given to restore the process to the creditor, the effect of which was to strike out the fact of “*capitis deminutio*,” in order that the plaintiff might obtain justice. See Puchta’s *Instit.* vol. iii. pp. 142, 143.

39. *Partes autem formularum hæc sunt; demonstratio, intentio, adjudicatio, condemnatio.* (y)

39. These are the parts of the formula: demonstration, intention, adjudication, condemnation.

(y) Gaius now proceeds to the explanation of the various parts of the formula, and of these he mentions four, the *Demonstratio*, the *Intentio*, the *Adjudicatio* and the *Condemnatio*. Every formula contained one or more of these parts, but very rarely all of them. The *Demonstratio* came immediately after the appointment of the judge, and presented the matter of fact on which the plaintiff founded his claim in the action which he had instituted. After the *Demonstratio* there usually followed the *Intentio*,

which set forth the legal claim of the plaintiff if the facts were as stated in the "Demonstratio." The "Condemnatio" followed immediately after the "Intentio," and contained the authorization of the magistrates to the judge, either to condemn or to absolve the defendant. This, says Von Vangerow, was the "tertia pars formulæ." See Institutes of Roman Law, s. 26. The "Intentio" must necessarily be found in every formula and usually the "Condemnatio." In regard to the "Intentio," see further the note to Gai. iv. s. 41.

A "Præjudicium," however, had no "Condemnatio," but simply the "Intentio," and hence it has not been included by all jurists in the *actio*. Its not having the *Condemnatio* distinguishes it from the *actio* in the strict acceptation of the term; but as it was a *judicium* it was certainly a species of *actio*, taking the latter term in its most extensive signification. See Keller's Civ. Proc. 155. The "præjudicium" was a legal proceeding which did not aim directly at the reparation of any act done illegally to be followed by condemnation, but had for its object the adjustment of some legal relation, or the decision of some matter of fact with reference to certain legal consequences: as whether a person be the libertus of a certain patron or not. Many other illustrations might also be given of this. It was a procedure by which such questions as the following were decided: whether a man were the child of a certain person; or whether a man were a free man or a slave; or what was the amount of the *dos* due from a person; or whether an announcement had been made, according to law, by a person accepting security as to the number of the Sponsors or Fidepromissores he had accepted as sureties for his obligation. Gai. iii. 123 Keller's Civ. Proc. s. 38.

The decision of such questions was called "præjudicium," and it is quite evident from the examples given that the object was not to obtain a *Condemnatio*, but to secure the decision of the affirmation made by the plaintiff in his *Intentio*. "Certe" says Gaius, "*intentio aliquando sola in-*

venitur, sicut in præjudicialibus formulis." Gai. iv. sec. 44. The Adjudicatio occurred in the so-called divisory actions; the "actio familiæ erciscundæ," the "actio communi dividundo," and the "actio finium regundorum." Among other points to which attention will be called hereafter, it should be understood that in these actions the judex was authorised to decree in his adjudication, that the property should be divided in approved parts, or that it should be burdened by servitudes in favour of one or other of the parties, for which purpose the Prætor gave instructions to the judex as the words of the formula preserved by Gaius clearly show. "Quantum adjudicari oportet judex Titio adjudicato." Gai. iv. sec. 42. In the examples given of the Roman formulæ, the Actor, or Plaintiff is denoted by the words Aulus Agerius, or simply A. A. and the Reus or Defendant by the words Numerius Negidius, or the letters N. N.

40. Demonstratio (z) est ea pars formulæ quæ præcipue ideo inseritur, ut demonstretur res de qua agitur. Velut hæc pars formulæ; "Quod Aulus Agerius Numerio Negidio hominem vendidit." Item hæc: "Quod Aulus Agerius apud Numerium Negidium hominem deposuit."

40. The *demonstratio* is that part of the *formula* which is especially introduced in order that the subject matter may be set forth which is the ground of the action, as for example, this part of the formula: "Because Aulus Agerius has sold a slave to Numerius Negidius:" or the following: "Because Aulus Agerius has deposited a slave with Numerius Negidius."

(z) The *demonstratio* was a brief statement of the legal transaction, or other legal matter of fact upon which the Plaintiff based his right to the action, and it was necessary in every *actio* brought to recover an *incerta*. The matter of fact referred to had in the formula its technical designation, as for instance, in the examples given by Gaius in the text, "Quod Aulus Agerius Numerio Negidio hominem vendidit." Again, "Quod Aulus Agerius apud

N. N. hominam deposuit," or Quod A. A. N. N. fundum Cornelianum vendidit, etc." This introduction of the formula by means of a Demonstratio probably originated in the "legis actio per arbitri postulationem." Keller p. 156. Sometimes in the place of the Demonstratio, or as a compensation for it we find explanatory matter introduced. The following points are worthy of notice: "*Præscriptiones in loco demonstrationis*," as in the case of the *innominate* contract—the unnamed real contracts. Such actions were naturally *incerta*, and therefore required a Demonstratio; but since they included a multitude of different legal transactions, which could not be brought under a single head, there was no single term as in "emptio venditio" to designate such modes of procedure. In consequence of this peculiarity, instead of the Demonstratio, the facts and circumstances of the legal transaction were stated, and this declaration was placed as a *Præscriptio* before the Intentio. It was from this peculiarity that the actio came to be called the "actio in præscriptis verbis." Under which designation were also included the "actio in factum civilis;" *præscriptiones in verbis factum*; utilis actio quæ *præscriptiones verbis rem gestam demonstrat*; civile intentione agere, etc." The following examples must suffice: "Ea res agatur, quod Aulus Agerius Numerio Negidio ea lege dedit, ut Stichum servum suum manumitteret, quidquid paret ob eam rem Numerium Negidium Aulo Agerio dare facere oportere ex fide bona ejus Numerium Negidium Aulo Agerio condemna si non paret absolve." Again, to take another example, "Ea res agatur, quod Aulus Agerius Numerio Negidio ea lege HS. X. accepto liberavit, ut Numerius Negidius sibi nomen Titii debitoris delegaret, quidquid paret ob eam rem, reliqua." See ll. 7. 9. Dig. de prec. (43. 26) Celsus explains when such actions in "*præscriptis verbis*" were necessary "Nam quum deficient vulgaria atque usitata actionum nomina, *præscriptis verbis agendum est*." l. 2. Dig. de præ. verb. (19. 5.) As an illustration, suppose a man had conveyed his land to another upon the latter agreeing to

pasture three oxen : in this case the short *Demonstratio* was inapplicable, as it was not ample enough to explain the cause of action. A more detailed explanation was required, and it was to this fuller statement that the term “in *præscriptis verbis*,” was applied.

2. *Præscriptiones* might also be employed as a limitation of the previous *Demonstratio*. For example, the plaintiff might declare that he did not at that time intend to avail himself of all that was set forth in the *Demonstratio*, but only to proceed for certain things. Such *Præscriptiones* were really “*Præscriptiones (receptæ) pro actore*,” and are treated by Gaius in connection with *Exceptiones*, as they were introduced by the plaintiff to rebut any unjust advantage of which the defendant might avail himself if the formula, pure and simple, were adhered to ; just as *Exceptiones* or *Pleas* were employed under like circumstances in favour of the defendant. Gai. iv. 131. See also Cic. de Orat. i. 37. Keller's Civ. Proc. 164—169.

3. There might be also “*Præscriptiones pro reo*” as an adjunct to the *Demonstratio*. These *Præscriptions* were employed in the earliest times in the interest of the defendant. They consisted indeed of peremptory or dilatory pleas, similar to the *Exceptiones*, which were used after the introduction of the formula. Before the time of Gaius they had lost their peculiarity, and being placed in the formula as *Præscriptiones* were regarded and treated as *Exceptiones*. Keller observes that the *Præscriptiones pro actore* and *pro reo* have a most ancient appearance, and, but for the peculiarity of their name, might have been ascribed to the “*legis actiones*.” There were no *Exceptiones* of a formal character used at the time of the “*legis actiones*,” but material ones were employed which operated as a “*Denegatio legis actionis*.” It is still a question with jurists whether the “*Præscriptiones pro reo*” are not the oldest form of exceptions or pleas in Roman procedure. See Keller's Civ. Proc. p. 141 et seq. 169—176, where the student will find this topic treated with great fulness.

41. *Intentio* est ea pars formulæ qua actor (a) desiderium suum concludit. Velut hæc pars formulæ: "Si paret Numerium Negidium Aulo Agerio sestertium x milia dare oportere." Item hæc: "Quidquid paret Numerium Negidium Aulo Agerio dare facere oportere," item hæc: "Si paret hominem ex jure Quiritium Auli Agerii esse."

41. The *intentio* is that part of the formula in which the plaintiff sets forth his legal claim. For example, the following part of the formula, "If it appears that Numerius Negidius ought to give to Aulus Agerius ten thousand sesterces;" or the following, "Whatever it appears that Numerius Negidius ought to give or to do, to or for Aulus Agerius;" also the following, "If it appears that this slave belongs to Aulus Agerius, *ex jure Quiritium*."

(a) The correctness of this reading has been lately doubted by Bekker, who thinks we ought to read "ex qua actor, etc.," because he says the *Intentio* was that part of the formula from which the plaintiff deduced that which he sought to obtain by the *actio*, namely, the *Condemnatio*. Huschke thinks that this view is incorrect, and says that the Roman jurists did not understand the *Condemnatio* to be a "desiderium actoris," but regarded it as an order of the *Prætor*. Gai. iv. 43. The word "concludit" in this passage he understands not to mean "concludes," but to have its usual signification of "includes" or "contains." Thus, to say, as is commonly the case, that the *Intentio* is that part of the formula in which the plaintiff lays down his concrete legal claim, he thinks is incorrect. It has been usually overlooked that the words used by Gaius, "si quidquid, etc., paret," are an essential part of the *Intentio*. The plaintiff, when he appeared in the court of the *Prætor*, had already asserted his right extra-judicially; what he now aimed at and pursued (*intendit et concludit*) by his suit was that the right which he had himself asserted might be legally and judicially acknowledged. At the time, and in the proceedings of the "*legis actiones*," there was no real *Intentio*, for at that period the plaintiff pursued his claim before the *Prætor*, by an external, and so to speak despotic act, when he uttered the words, "Hunc servum meum esse aio ex jure Quiritium,

etc." It was not therefore on account of the assertion of the plaintiff, but in consequence of the denial of the defendant, that the party who was found to be in the wrong was punished by the fine known as the "sacramentum," which was a penalty inflicted by law upon the party who failed in his suit, and who was in consequence regarded as a disturber of the public peace. It was because it was thus viewed that "*utrius sacramentum justum esset.*" All this, however, was abolished when the despotic prosecution of a man's right ceased by the abolition of the "*legis actiones*," and upon the introduction of a judicial prosecutor in the person of the Prætor skilfully administering the new process termed "*per formulas.*" All power was now placed in the hands of the magistrate. The "*formula actionis*" and the "*judicis postulatio*" rested with him, and the mode in which the plaintiff had hitherto personally maintained his right was changed into a desire to have it recognised by the magistrate, in order to secure a remedy by means of his authority. Hence the words "*si paret et reliqua.*" The case of the plaintiff was not put hypothetically by the Prætor with a view to the *Condemnatio*, nor did he use the words, "*si tibi parebit, judex, rem Auli Agerii esse,*" but merely the words "*si paret.*" If the action were *in personam*, it is worthy of remark, and confirmatory of the above view, that the *Novation* of the obligation took place, not from the moment when the judge pronounced his sentence, but that it dated back to the period of the "*litis contestatio.*" If the above remarks are borne in mind, it will not lead us erroneously to take the *Intentio* as denoting the simple assertion by the plaintiff of his right. However, the term, "*paret,*" as well as the word "*aio,*" in the "*legis actiones*"—which contains in all probability the germ of the *Intentio*—show that an appeal was made to the magistrate by the plaintiff for the purpose of obtaining the aid of the state in the restoration of his right. See Huschke's *Kritik in loco*.

We must now proceed to explain more in detail the *Intentio* and its connexion with the different forms of actions.

The *Intentio* was that part of the formula in which the *Prætor* set forth the legal claim or right of the plaintiff. As in the examples, "If it appears that Numerius Negidius ought to give to Aulus Agerius ten thousand sesterces, etc." This was indeed the principal part of every formula, as it stated the right or claim of the plaintiff and its violation. "*Formulæ*" or "*actiones*" might be either *in rem* or *in personam*. This division as already observed was a principal one, corresponding to real and personal rights. See page 582 et seq.

An action was conceived *in personam* when a right of claim was set forth. The *Intentio* of such an action mentioned the name of the defendant, and then stated what he ought to do or to perform. Thus: "*Si paret Numerium Negidium Aulo Agerio x milia dare oportere.*" An action was said to be *in rem*, when not *in personam*, using the latter term in its most extensive signification. The *Intentio* of the formula *in rem*, with the exception of the "*actio confessoria*" and "*negatoria*," contained only the assertion of the right of the plaintiff, and did not mention the defendant. Thus: "*Si paret hominem ex jure Quiritium Auli Agerii esse.*" Here the defendant is not mentioned; all that is referred to is the dominium and right of the plaintiff. Thus such an action was the exact opposite to one arising out of an obligation, which was always aimed directly against the person of the defendant. See note to sec. 3. note to sec. 5. and p. 611 et seq.

The only exception to the above remarks was in the case of the "*actio negatoria*," which was given to the owner of property to enable him to protect his dominium from the unjust imposition of servitudes. This was a pure vindication. "*De servitutibus*" says Ulpianus, "*in rem actiones competunt nobis ad exemplum earum, quæ ad usum fructum pertinent, tam confessoria, quam negatoria; confessoria ei, qui servitudes sibi competere contendit, negatoria domino, qui negat. Hæc autem in rem actio confessoria nulli alii, quam domino fundi competit; servitutem enim*"

nemo vindicare potest, quam is, qui dominium in fundo vicino habet, cui servitutem dicit deberi." l. 2. pr. et s. l. Dig. si servit. vind. (8. 5.)

The "in rem actiones" were called "vindicationes" and "petitiones," both terms of equal importance. The expressions "vindicatio in servitutem," "vindicatio filii in potestatem," and the "vindicatio in libertatem," show the wide range which the vindication as an actio *in rem* possessed. The relation of these actions to the older form of procedure, has given rise to not a little discussion. The "in rem agere per sponsionem" and the "hereditatis petitio" were, it is believed, derived from the "legis actio sacramento." Gai. iv. 91. 93. Cic. Ver. 1. 45. Vat. Frag. 336. l. 1. s. 2. Dig. de rei. vind. (6. 1.)

In speaking of the "in rem actio," Gaius says in the passage just referred to, "Ceterum cum in rem actio *duplex* sit, aut enim per formulam *petitoriam* agitur, illa stipulatio locum habet quæ appellatur *iudicatum solvi*, si vero per sponsionem, illa quæ appellatur *pro præde litis et vindiciarum*." Gaius then explains the distinction between the "petitoria formula," and that "per sponsionem." "Petitoria autem formula hæc est qua actor intendit rem suam esse. Per sponsionem vero hoc modo agimus: provocamus adversarium tali sponsione. 'Si homo quo de agitur, ex jure Quiritium meus est, sestertios xxv nummos dare spondes?' Deinde formulam edimus qua intendimus sponsionis summam nobis dare oportere. Qua formula ita demum vincimus, si probaverimus rem nostram esse." Gai. iv. 91. 93. It is uncertain at what time the "petitoria formula" first appeared, and also in what relation the "sponsio præjudicialis" arose. It is ascertained that in the formula petitoria the defendant who was in possession was bound to give security, and if the suit went against him he lost the sum that he had pledged on the sponsio. See Gaius iv. s. 13. and note. By this pledging of a sum of money, the decision of the strife not only determined who should lose the amount staked, but the judge presiding over the investigation decided also the question of right which had led to

the “*summa sponsionis*.” The “*rem agere per sponsionem*” was an indirect method, but it was not the less effective in settling any dispute between litigant parties. It was also a penalty imposed upon the party, who, without any defence, allowed himself to be cited into a court of justice. Its extension also to the plaintiff, by means of the restipulation, held in check those who rashly cited defendants before the tribunals against whom they had no claim. The “*rem agere per sponsionem*” marked the transition from the “*legis actio sacramenti*” to the direct formula. It was a gradual developement which was ultimately perfected in the “*formula petitoria*.” We find this process referred to by Cicero and Gaius as applicable, in the first place to cases of *dominium*, and afterwards to the *hereditas*. The following will explain in outline the peculiarity of this formula. “*Titius Judex esto. Si paret, illam rem (for example—hominem Stichum, fundum Cornelianum L. Annii hereditatem) quo de agitur ex jure Quiritium Auli Agerii esse, neque (nisi) eam Numerius Negidius Aulo Agerio arbitrato tuo restituit, quanti ea res erit Numerium Negidium Aulo Agerio condemnato, si non paret absolvito.*” Without pursuing this subject further, it may be mentioned that the advantages of this “*formula judicii*,” arose from the fact that it enabled the suitor to attain by a single process what by the “*in rem agere per sponsionem*” could only be done by several steps. In the older method of proceeding there were :—1. The fixing and agreement of the “*summa sponsionis*” before the magistrate. 2. The granting of the “*formula ex sponsione*.” 3. After the plaintiff had obtained a favourable verdict from the *judex*, there was required the initiation of an “*Arbitrium litis æstimandæ*.” Gaius iv. 41, 53, 91—95. Cic. Ver. ii. 12. Compare l. 45. Pro. Publ. Quintus 8. 27. Keller’s Civ. Proc. ss. 26, 27, 28. pp. 101—113.

A further division of actions was that some were for a determinate sum (*certæ*) ; others for an indeterminate one (*incertæ*) It can scarcely be called with accuracy, as Mr. Long

terms it, "a name given by modern writers," for, as he observes, Gaius says, "*Condemnatio autem vel certæ pecuniæ in formula ponitur vel incertæ.*" Whatever opinion we may form of the division, it is a convenient one, and is still recognised by all continental jurists.

An *actio* was said to be *certa* when the subject of the action was determined, as when the person, or the quantity, or the quality, was ascertained; for example, a "*certam pecuniam*," or a certain thing, as "ten bushels of African wheat," or 'ten bottles of Cyprus wine.' An *actio* was said to be *incerta* when the object is undetermined, or, as it was technically expressed, "*cum taxatione*," or when the formula, was for "*quanti ea res erit tantam pecuniam, etc., condemna*;" or to give a less technical explanation, when the suit was for the recovery of a horse or a slave, without mentioning what horse or slave, as *Bucephalus* or *Stichus*.

All "*actiones in rem*" are obviously actions for a *certæ*, as the thing in dispute was always a definite individual thing. In such actions the plaintiff was bound to name the object for which he sued—a certain house, or field, or slave. The vindicatio of a *pars incerta* was only allowable as an exception. Gaius iv. 43, 44. Thus, the same jurist, in his work "*ad Edictum provinciale*," says, "*Quæ de tota re vindicanda dicta sunt, eadem et de parte intelligenda sunt; officioque judicis continetur, pro modo partis ea quoque restitui jubere, quæ simul cum ipsa parte restitui debent. Incertæ partis vindicatio datur, si justa causa interveniat. Justa autem causa esse potest, si forte legi Falcidiæ locus sit in testamento propter incertam detractionem ex legatis etc.*" l. 76. pr. s. l. Dig. de rei vindic. (6. 1.)

Actiones in personam are partly *certæ* and partly *incertæ*. Those which were originally *incertæ* were termed *arbitria*, and in these the amounts to be recovered were at first undetermined. It will be remembered that, in the case of the *Judicia*, the sentence was for what we now term liquidated damages. Thus in the "*formula arbitria*" given by Gaius, the words are, "*Quantum æquis melius id dari.*"

Gaius. iv. 50. The actions *in personam* for a definite amount (*certa*) had their origin in strict civil transactions, and delicta, as the Sponsio, Nexum, Testaments, &c. At a later period also, the plaintiff in a personal action might have a claim for an *incertum*, as in the case of a testament and a *mutuum*. It was in this gradual way that the development of the Roman law of Obligations, with its wonderful symmetry, elasticity and adaptation, originated.

“*Actiones certæ*” proceeded for a “*dare oportere* :” that is to say, they asserted that the defendant ought to give to the plaintiff the subject claimed on the ground of the latter being civilly entitled, so that the plaintiff might be in a position on his part to protect his right, if necessary, by an *actio in rem*. The *Intentio* of such an action is given by Gaius, and it contains in definite and precise terms the thing claimed in the suit. “*Si paret Numerium Negidium Aulo Agerio sestertium x milia dare oportere.*” Gaius, iv. 41. Gaius again says, “*Stipulationem quædam certæ sunt, quædam incertæ ; certum est, quod ex ipsa pronuntiatione apparet, quid, quale, quantumque sit, ut ecce aurei decem, fundus Tusculanus, homo Stichus, tritici Africi optimi modii centum, vini Campani optimi amphoræ centum.*” Again, Ulpianus says, “*Ubi autem non apparet, quid, quale, quantumque est in stipulatione, incertam esse stipulatione dicendum est. Ergo si qui fundum sine propria appellatione, vel hominem generaliter sine proprio nomine, aut vinum, frumentumve sine qualitate dari sibi stipulatur, incertum deducit in obligationem. Usque adeo, ut si quis ita stipulatus sit: tritici Africi boni modios centum, vini Campani boni amphoras centum? Incertum videatur stipulari, quia bono melius invenire potest; quo fit, ut boni appellatio non sit certe rei significativa, quum id quod bono melius sit, ipsum quoque bonum sit. At quum optimum quisque stipulatur, id stipulari intelligitur, cujus bonitas principalem gradum bonitatis habet; quæ res efficit, ut ea appellatio certi significativa sit.*” l. 74, 75. Dig. de verb. oblig. (45. 1.) s. 14. Instit. de action. (4. 6.)

In the "*actio incerta*" the formula began with some such words as the following: "*Quidquid paret Numerium Negidium Aulo Agerio dari facere oportere*" or, "*Quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona*, etc." Gaius iv. 41. 47. In the latter formulæ there is manifestly a complete uncertainty in the claim, and they are exactly opposed to the formulæ given in the *actiones certæ* in which the claim was distinctly set forth. There could evidently be no "*plus petitio*" in an "*incerta formula*." "*Illud satis apparet in incertis formulis plus peti non posse, cum certa quantitas non petatur, sed 'quidquid adversarium dare facere oporteret' intendatur, nemo potest plus intendere.*" "*Idem juris est et in si in rem incertæ partis actio data sit.*" Gaius, iv. 54. Ib. l. 5. pr. s. 2. Dig. de præ. verb. (19. 5.) l. 2. de verb. oblig. (45. 1.) ll. 175, 189, 218, Dig. de verb. sig. (50. 16.)

In the time of the classical jurists the term "*præstare*" was applied to every possible performance, and it had no technical meaning. The words used in the formula were "*dare, facere, præstare.*" See however pp. 484, 485. In the "*actio furti*" the formula ran, "*pro jure damnum (decidere oportere).*" Gaius, iv. s. 37. 45. The "*actiones certæ in personam*" might arise out of any legal transaction as a "*certa pecunia*," or "*alia res certa*," they included originally the "*legis actiones per conditiones.*" The "*res certa*" was required to be clearly set forth as in the following expression: "*Ten thousand bushels of the best African wheat.*" At a later period in Roman Civil Process, the "*condictio incerta*" came into use. The original *Condictio* was always for a *certa*. When an *actio* arose out of a "*stipulatio incerta*," the action was still said to be "*ex stipulatu.*" Gaius says, "*Si cum ipso agamus qui incertum promiserit, ita nobis formulam esse propositam, ut præscriptio inserta sit formulæ loco demonstrationis, hoc modo 'Judex esto. Quod Aulus Agerius de Numerio Negidio incertum stipulatus est, modo cujus rei dies fuit, quidquid ob rem Numerium Negidium Aulo Agerio dare facere oportet,' et*

reliqua. Gaius iv. 136. See also ss. 5. 18. In the "actio incerta" there was always some additional expression, as "ex bona fide," or "recte," or some such addition, in consequence of which the verdict assumed the form of an Arbitrium. It was this addition to the formula which gave to the Judex permission to employ as free a rule in his decision as that which guided even the Arbitrator himself. Hence in this way the Arbitrium of the older jurisprudence was, to a certain extent, introduced into the more recent actions of the Roman law, as, for instance, into the "actiones empti venditi, locati conducti, pro socio, negotiorum gestorum, fiduciæ, finium regundorum," and a number of other actions. There now arose a new distinction between actions *in personam*, namely that of actions *bonæ fidei* on the one hand, and actions *stricti juris* on the other; "bonæ fidei" being all for an *incerta*. Thus an action arising from an uncertain stipulation was called a *bonæ fidei* action. It was not, however, every "actio incerta" that was an "actio bonæ fidei." Cic. de offic. iii. 15, 16. Gaius iv. 62, 114. ss. 28—30. Instit. de action. (4. 6.)

42. Adjudicatio est ea pars formulæ qua permittitur judici rem alicui ex litigatoribus adjudicare: velut si inter coheredes familiæ erciscundæ agatur, aut inter socios communi dividundo, aut inter vicinos finium regundorum. Nam illic ita est: "Quantum adjudicari oportet, judex Titio adjudicato." (b)

The *adjudicatio* is that part of the formula which authorises the judge to adjudicate the thing in controversy to one of the contending parties; for example, when the co-heirs proceed for partition of the inheritance by means of the *actio familiaris erciscundæ*; or partners, by the action for a division of the common stock (*communi dividundo*); or neighbours, by the action for settling boundaries (*finium regundorum*): for then it is expressed thus, "Judge, adjudge to Titius so much as ought to be adjudicated to him."

(b) The "Adjudicatio" was found only in the three personal actions, "familiæ erciscunda," "communi dividundo," "finium regundorum." See note to iv. 39. It

was a faculty given to the judge to adjudicate upon the matter in dispute. The former appears to have been prescribed as in the text: "Quantum adjudicari oportet judex Titio adjudicato." The judex had power to adjudge the property and also to pronounce a *Condemnatio*. The three actions just mentioned were called mixed, but not in the sense that the plaintiff sued for both the thing and the *penalty*, for the suit was simply concerning the thing and the *person*. It is in this sense only that Justinian was able to call them *mixed* actions, as being both real and personal: "Tam in rem quam in personam." They could not, strictly speaking, be "actiones in rem," as such actions did not name the defendant, whilst the "actiones in personam" did; and, as Domenget observes, "we cannot both name a person and not name him at the same time." Mr. Sandars correctly observes that in these actions "the judge discharged the function assigned him equally for the benefit of all persons interested in the subject matter of the action." s. 20 Instit. de action. (4. 6); see Ortolan in loco; Domenget, p. 477.

43. *Condemnatio* est ea pars formulæ, qua *judici* condemnandi absolvendive potestas permittitur velut hæc pars formulæ: "Judex Numerium Negidium Aulo Agerio sestertium x milia condemna. Si non paret absolve." Item hæc: "Judex Numerium Negidium Aulo Agerio dumtaxat x milia condemna. Si non paret absolvito. Item hæc: "Judex Numerium Negidium Aulo Agerio [x milia] condemnato" et reliqua, ut non adiciatur. (c)

43. The *condemnatio* is that part of the *formula* which empowers the judge to condemn or to absolve, for example, the following part of the *formula*—"Judge, condemn Numerius Negidius in the sum of ten thousand sesterces to Aulus Agerius; if it appears that Numerius Negidius ought not to pay this sum, absolve him." Also the following "Judge, condemn Numerius Negidius to the extent of ten thousand sesterces to Aulus Agerius. Absolve him if it appears that he ought not to pay this sum. Again, the following, "Judge, condemn Numerius Negidius to Aulus Agerius for ten thousand" and so on without adding (if it does not appear absolve).

(c) The *Condemnatio* was that part of the process which directed the judge either to condemn or to absolve; the

formula in brief ran as follows, "Judex . . . condemna. Si non paret absolve." The instructions of the Prætor either authorized the judge to condemn the defendant in a certain specified amount, or left it to him to decide to what extent a penalty should be inflicted on the defendants by his condemnation. Three distinct cases should be noted:—

1. When the judge had no discretion left him as to the amount for which he should give his sentence. This was the case in the "*condictio certa*," and in the "*actiones in factum*" for a *certa* with a pecuniary penalty. The Prætor said in his instructions to the judge, if the circumstances upon investigation are found as stated in the formula, then judex condemn the defendant in the sum of five thousand sesterces, or for any other sum which the magistrate might insert. Gaius gives the formula for this "*certa pecunia*." iv. 50.

2. There might also be an *Intentio incerta*, as "*Quidquid paret Numerium Negidium Aulo Agerio dare facere oportere*;" or again, there might be an *Intentio certa*, as in the case of the *vindicatio* of a slave. "*Si paret hominem ex jure Quiritium Auli Agerii esse*," Gaius iv. 41. and again reference might be made to the value of the slave in the words: "*Quanti ea res erit tantam pecuniam judex Numerium Negidium Aulo Agerio condemna. Si non paret absolvito*." Gaius, iv. 51.

3. The Judge might also be empowered to condemn not in an absolute sum, but within the limit of a definite maximum amount. This was called the "*condemnatio cum taxatione*." Thus the judex might be instructed in the formula to condemn a father or a master to the extent of the *peculium* of his slave, and in this case he could not exceed the given amount. There was a limit set, or, as Gaius expresses it, the judge was empowered to condemn "*cum aliqua præfinitione*," and not "*infinita*," just as when his instructions contained the words "*Quanti ea res erit*." The outline of this maximum form of condemnation is given, "*Ejus judex Numerium Negidium Aulo Agerio dumtaxat x milia condemna. Si non paret, absolve*."

Again, the condemnatio was given against the defendant for a specific sum of money, and not for the delivery or specific performance of the thing itself. For instance, if the object of the controversy were a house, the compensation was given to the plaintiff in a sum of money. In the time of the "legis actiones," we find a special "arbitrium litis æstimandæ." In the formula, the "æstimatio" was left to the judex by the insertion of the expression "quanti ea res sit." The pecuniary damages, however, were fixed in most cases for a larger sum than the actual value of the property, for as the defendant could not be forcibly expelled from the house, it was only fair that he should be compelled to pay more than the value of the property which he continued unlawfully to hold.

Some actions also were deemed *Infamous*. In an Infamous action it was the duty of the judge to determine and to point out the right of the plaintiff, and then by his order to leave it to the voluntary act of the defendant to recognise and to submit to the claim that the plaintiff had lawfully established. To do this there was no need of a Condemnatio and if the defendant at once submitted, as there would thus be an end to litigation between the parties, it would have been superfluous to have pronounced the Condemnatio. If, however, the defendant did not submit to the decision of the judge, and yield to the claims of the plaintiff, the Condemnation with compensatory damage immediately followed. "Quod si nec restituat neque exhibeat quanti ea res est condemna." Gaius. iv. 141. The formula in such a case was as follows: "Titius judex esto. Si paret Aulo Agerio jus esse eundi agendi in (or utendi fruendi, as the case might have been) fundo Corneliano, or tigna immitendi in parietem ædium Sempronium, or ædes suas (with or without invito Numerio Negidio) altius tollendi, or likewise, ita ædificatum habere quo de agitur neque Numerius Negidius Aulo Agerio arbitrato tuo restituet, quanti ea res erit, Numerium Negidium Aulo Agerio condemna. Si non paret absolve." l. 4. s. 2. 4. 7. l. 6. s. 2. 8. 55. 4. l. 9 pr.

l. ult. Dig. si ser. vin. (8. 5) Keller's Civ. Proc. pp. 109, 113. The actions to which this addition was given were called "*actiones arbitrariæ*." They were "*judicia in jus*" or "*in factum conceptæ*" as far as their *Intentio*, and "*arbitria*" as far as their *Condemnatio* was concerned. Or in other words they were "*judicia*," with the proviso that from and after the moment of the "*pronunciatio secundum actorem*" and throughout the rest of their process, they should be regarded as "*arbitria*." Keller's Civ. Proc. p. 385. Cic. in Ver. ii. 12. s. 31. Instit. de action. (4. 6.) l. 41. s. 1. Dig. de re judic. (42. 1.) Savigny's System. v. s. 221—223.

44. Non tamen istæ omnes partes simul inveniuntur, sed quædam inveniuntur, quædam non inveniuntur. Certe intentio aliquando sola invenitur, sicut in præjudicialibus formulis, qualis est qua quæritur aliquis liberatus sit, vel quanta dos sit, et aliæ complures. Demonstratio autem et adjudicatio et condemnatio numquam solæ inveniuntur, nihil enim omnino sine intentione vel condemnatione valet; item condemnatio sine [demonstratione vel] intentione vel adjudicatione nullas vires habet, et ob id numquam solæ inveniuntur.

44. Still all these parts of the formula are not found in every action; some are met with, others not. At least, in some cases the *intentio* alone is found; as in the prejudicial formula. Such is the action by which inquiry is made whether a man is a *libertus*, or how great a *dos* may be, and many others; but the *demonstratio*, the *adjudicatio*, and the *condemnatio* are never found alone, for nothing can possibly have operation without the *intentio*, or the *condemnatio*; again the *condemnatio* without [the *demonstratio*] the *intentio* or the *adjudicatio* has no force; and on that account these are never found alone.

45. Sed eas quidem formulas in quibus de jure quæritur *in jus* conceptas vocamus. Quales sunt quibus intendimus nostrum esse aliquid *ex jure Quiritium*, aut nobis dare oportere, aut pro fure damnum decidere oportere; in quibus juris civilis intentio est. (1)

45. But those formulae in which a question in regard to a civil clause (*de jure*) is treated, we call *in jus conceptas*. Of this kind are those by which we claim that a certain thing is ours *ex jure Quiritium*, or that it ought to be given us; or that some one ought to give sentence on a damage caused by a theft; these are formulae in which the *intentio* is in accordance with the *jus civile*.

(d) The “*actiones incertæ*” usually contained the *Demonstratio*, *Intentio*, and *Condemnatio*. So also the old *Arbitria* as “*bonæ fidei judicia*,” the new “*condictio incerti*,” and the new “*actio injuriarum* (in bonum et æquum concepta).” It was different with the new (*bonæ fidei*) “*actio prescriptis verbis*,” and the so-called three “*actiones divisoriæ*,” which added also the “*adjudicatio*,” so that in these actions were found all the four parts of the formula. Thus the formula for the “*actio communi dividundo*” ran nearly in the following words: “*Caius judex esto. Quod Lucio Seio cum Quinto Licinio fundus Titianus, qua de re agitur, communis est, qua de re Lucius Seius Quintum Licinium (or alter alterum) communi dividundo provocavit, quantum paret ob eam rem alteri ab altero adjudicari alterumve alteri condemnari oportere ex fide bona, tantum judex alteri ab altero adjudicato tantique alterum alteri condemnato. Si non paret absolvito.*” The elimination of the four parts of the formula in the above example will not be found difficult.

The “*actiones in factum conceptæ*,” corresponding to the “*actiones in jus conceptæ*,” had only the *Intentio* and the *Condemnatio*. When the *Intentio* was conceived *in jus*, the judge was required to examine and to take into consideration in his sentence the *jus civile*. If on the contrary it was conceived *in fact*, it was merely the duty of the judge to examine and decide upon the question of fact submitted to his consideration. “*Præjudicia*” had only the *Intentio*, as they were employed simply to determine a legal relation, or an important matter of fact, for future use in a suit or otherwise. It is obvious that no *Condemnatio* was required in such cases.

The *Intentio* was found in every action, and so also was the *Condemnatio*, excepting in the “*formulae præjudiciales*” just referred to. On the other hand, the *Demonstratio* was found in *nearly* all the “*actiones in personam*,” and the *Adjudicatio* only in the three “*judicia divisoria*.”

Every formula commenced with the naming of the *Judex*,

Arbiter, or Recuperatores, and the expressions "nisi restituat, nisi exhibeat," were employed in the class of actions termed "actiones arbitrariæ." For denoting the names of the parties to the suit the Romans used from a very ancient time, the fictitious names of Aulus Agerius and Numerius Negidius, merely to fill up the blanks. These feigned names were struck out in an actual suit, and those of the real parties were inserted in their place. In this respect the custom was quite different from ours, for John Doe and Richard Roe, used in English practice, were distinguished persons who figured in the actual suit.

The names of the parts of the formula are found very often in the "Corpus juris civilis," less often the term formula itself. The other and subordinate parts of the formula will be referred to in their proper places. See Keller's Civ. Proc. pp. 161—164. Domenget note to iv. 9. pp. 476, 477. and in loco. Cic. in Ver. ii. 11, 12. Pro. Roscio. Com. c. 4.

46. *Ceteras vero in factum conceptas vocamus (c), id est in quibus nulla talis intentionis conceptio est, sed initio formulæ, nominato eo quod factum est; adiciuntur ea verba per quæ judici damnandi absolvendive potestas datur. Qualis est formula qua utitur patronus contra libertum qui eum contra edictum Prætoris in jus vocat; nam in ea ita est; "Recuperatores sunt. Si paret illum patronum ab illo liberto contra edictum illius prætoris in jus vocatum esse, recuperatores illum libertum illi patrono sestertium x milia condemnate. Si non paret absolvite."* Ceteræ quoque formulæ quæ sub titulo de in jus vocando propositæ sunt in factum conceptæ sunt: velut adversus eum qui in jus vocatus neque venerit neque vindicem dederit; item contra eum qui vi exemerit eum qui in jus vocatur. Et denique

46. But on the other hand the remaining actions are said to be *in factum conceptas*, in these no conception of such *intentio* is contained; but in the beginning of the *formula* after a statement of the matter of fact, the formal words are added by which power is given to the judge either to condemn or to absolve. Of this kind is the *formula* which the *patronus* employs against his *libertus* who, in violation of the edict of the *prætor*, calls his patron in *jus*; for this action is conceived as follows, "Let there be *recuperatores*. If it appears that this patron has been cited in *jus* by his *libertus* in violation of the edict of the *prætor*, let the *recuperatores* condemn this *libertus* in the sum of ten thousand sesterces to his patron, if it does not thus appear, absolve him." Also the remaining *formulæ* proposed under the title, "*De in*

innumerabiles ejusmodi aliæ formulæ
in albo proponuntur.

jus vocando,"are conceived in *factum*; as, for example, the action given against the party who being called in *jus* has neither made a personal appearance, nor appointed any one to defend him; also against him who has kept back by force anyone similarly summoned before the *prætor*. And finally, innumerable other *formulæ* of the same kind are proposed in the edict of the *Prætor*.

(e) The "formula in *factum* concepta" contained at its commencement a statement of the matter of fact which gave rise to the action, and was prescribed either for a *certa* or for an *incerta*. It might also be either *in rem* or *in personam*.

Such introductory statements were immediately followed by the *Condemnatio*. This narration of facts was sometimes called a "*Quasi Intentio*," as there was no real *Intentio*; and sometimes it was termed a "*Designatio*." The "*actiones in factum conceptæ*" stood in closer relation to "*judicia*" than they did to "*arbitria*," and the instruction to the *judex* differed according to their nature and objects. For example, in some actions *ex delicto* the *Prætor* would instruct the judge to enquire as to the fact alleged, and on ascertaining its truth to assess the amount of damages on equitable principles. "*Quantæ pecuniæ ob eam rem bonum et æquum esse parebit*."

In general, the *judex* was required simply to concern himself with the bare matters of fact, and if they were found to be true, it was his duty to condemn the defendant in accordance with the instructions given by the *Prætor*, without troubling himself about any question of law whatever. The amount of the *Condemnatio*, however, was at times left more or less to the discretion of the judge; thus a maximum sum might be mentioned, or the question of damages might, if the *Prætor* thought fit, be entirely withdrawn from the *judex*. Gaius gives an example of this formula in the case of a *depositum*. "*Judex esto. Si paret Aulum Agerium*

aput Numerium Negidium mensam argenteam deposuisse eamque dolo malo Numerii Negidii Aulo Agerio redditam non esse, quanti ea res erit, tantam pecuniam iudex Numerium Negidium Aulo Agerio condemnato. Si non paret, absolvito." Gaius iv. 47.

The following formulæ of the "actio in factum concepta" will further explain this mode of procedure. The first is the formula of an action against a Libertus. The Libertus, it will be remembered, was not allowed to proceed against his Patronus (*in jus vocare*) without first obtaining the permission of the Prætor. If he did so, he rendered himself liable to the penalty of fifty Aurei.

"Licinius, Sempronius, Titinius, Recuperatores sunt. Si paret Aulum Agerium Patronum a Numerio Negidio liberto contra edictum Cornelii Prætoris in jus vocatum esse, Recuperatores Numerium Negidium libertum Aulo Agerio Patrono, etc., condemnato. Si non paret absolvito."

The "actio quasi Serviana" was probably prescribed in the following form: "Octavius iudex esto. Si paret, eam rem, qua de agitur, ab eo, cujus in bonis tum fuit, ob pecuniam promissam, etc. Aulo Agerio pignori obligatam, eamque pecuniam, neque solutam, neque eo nomine satisfactum esse, neque per Agerium stare, quominus solvatur satisve fiat, nisi arbitrato tuo Numerius Negidius Aulo Agerio restituet. Quanti ea res erit, Numerium Negidium Aulo Agerio condemna, si non paret absolve." Such "actiones in factum" were gradually developed by the Prætors, and applied in a great number of instances in order to suit more exactly the demands of justice. Many of these formulæ it is thought were preserved as "common forms" in the Album of the magistrate, available on the application of any plaintiff to whose case they might be deemed applicable. The "actiones in factum conceptæ" in many respects took the place of the older mode of process *per sponsionem*, and hereafter it will be seen that they stood in very close relation to the Interdicts. The "formulæ in factum conceptæ" as an independent class of actions, were

in immediate opposition to the formulæ “in jus conceptæ.” The former, we see by the examples given, commenced with the words “Si paret, etc,” the latter with the words “Quod Aulus Agerius, etc.—Whereas A. A. did so and so.” The *judex*, in the “*actio in jus concepta*,” as the condition of his *Condemnatio*, was bound to ascertain the concrete right (e.g., a dare, dare facere, damnum decidere—oportere, ex jure Quiritium actoris esse, etc.,) set forth in the *Intentio*, and to give judgment not only as to the truth of the statements submitted to him, thus deciding upon the facts of the case; but he was also able from his knowledge of the *jus civile*, after having weighed both the facts and the law, to decide whether the plaintiff was entitled to obtain a verdict, and consequently to succeed in his suit, or whether it was his duty to absolve the defendant. See Keller’s *Civ. Process*, s. 33. pp. 125—130. Heineccius *Antiq. Rom.* lib. iv. tit. 6. s. 25.

47. Sed ex quibusdam causis Prætor et in jus et in factum conceptas formulas proponit, velut depositi et commodati. Illa enim formula quæ ita concepta est: “Judex esto. Quod Aulus Agerius aput Numerium Negidium mensam argenteam deposuit, qua de re agitur, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, ejus judex Numerium Negidium Aulo Agerio condemnato, nisi restituat. Si non paret absolvito”—in jus concepta est. At illa formula quæ ita concepta est: “Judex esto. Si paret Aulum Agerium aput Numerium Negidium mensam argenteam deposuisse eamque dolo malo Numerii Negidii Aulo Agerio redditam non esse, quanti ea res erit, tantam pecuniam judex Numerium Negidium Aulo Agerio condemnato. Si non paret, absolvito”—in factum concepta est.

47. But in certain actions the *Prætor* can deliver a *formula* conceived both in *jus* and in *factum* as, for example, in the case of a depositum and commodatum. For the *formula* which is framed as follows:—“Let there be a judge. Because Aulus Agerius has deposited with Numerius Negidius a silver table, which is the object of this suit, whatever on account of this thing, Numerius Negidius ought in good faith to do, or give to Aulus Agerius, let the judge condemn Numerius Negidius for that amount to Aulus Agerius, unless he restore the property. If it does not appear, absolve him”—is prescribed in *jus*. But the *formula* which is thus prescribed is conceived in *factum*, “Let there be a judge. If it appears that Aulus Agerius has deposited a silver table with Numerius Negidius, and that Numerius

Similes etiam commodati formulæ sunt.

Negidius has wrongfully refused to pay to Aulus Agerius the value of this table. Let the judge condemn Numerius Negidius to pay an equivalent sum of money to Aulus Agerius. If it does not appear, absolve him." Similar also are the formulæ for the *actio commodati*.

48. Omnium autem formularum quæ condemnationem habent ad pecuniariam æstimationem condemnatio est. Itaque etsi corpus aliquod petamus, *velut fundum, hominem, vestem, aurum, argentum*, iudex non ipsam rem condemnat eum cum quo actum est, sicut olim fieri solebat, æstimata re pecuniam eum condemnat. (f)

48. Moreover, in all the formulæ which contain the *condemnatio*, the condemnation is prescribed with a view to pecuniary compensation. Therefore although we demand a certain *corpus*, as a piece of land, a slave, a garment, gold, or silver, the judge does not condemn the defendant to give the thing itself which is the object of the suit, as was the case in former times, but condemns him to pay the estimated value.

(f) The Judge was bound to condemn for a certain sum, although the amount might be left in uncertainty, in the formula, "etiam si de incerta quantitate apud eum actum est," and although he was in other respects rigorously fettered by his instruction. The entire object indeed of the process was to obtain in definite terms the *sententia* or judgment, the effect of which was denoted by the words *res judicata*, and which could not have been final without definite compensation. Dig. "De re judicata et de effectu sent. et de interlocut." (42. 1.) Paul. Sent. v. 5. a. Cod. "De sententiis et interlocutionibus omnium iudicium." (7. 45.) We have already seen that in the "Præjudiciales formulæ" there was no Condemnation, but that the judge simply pronounced his sentence upon the matters of fact submitted by the magistrate to his judgment. In this way he might decide in a case of disputed citizenship "*ingenuum videri*," or upon a question of slavery "*servum non videri*." It should be remembered that under the procedure

"per formulas" the condemnation was always pecuniary. We have seen, however, that under the "*legis actiones*," when the plaintiff sued in a real action the judge gave him the thing itself. Gaius iv. 16. In the time of Justinian the judge condemned the plaintiff to restore the thing if it were possible, but if this could not be, the defendant was sentenced to pay a sum of money. s. 32 Instit. de action. (4. 6) l. 17. Cod. de fidei. lib. (7. 4). The judge might perhaps assess the sum for which the plaintiff sued; or if the amount were indefinite, as if a *maximum* sum were mentioned, he might, and indeed it was his duty to fix a definite sum. Before the procedure "*per formulas*," the judge was authorised to condemn the defendant to make compensation in other things besides money. It was not till the system of the formulæ was introduced that the *judex* was directed to condemn the defendant to pay a specific sum of money to the plaintiff. Domenget in loco, and iv. 52. Puchta's Instit. vol. ii. pp. 206. et seq. and note *e* p. 208.

49. *Condemnatio autem vel certæ pecuniæ in formula ponitur, vel incertæ.*

50. *Certæ pecuniæ in ea formula qua certam pecuniam petimus; nam illic ima parte formulæ ita est: "Judex Numerium Negidium Aulo Agerio sestertium x milia condemna. Si non paret, absolve."*

51. *Incertæ vero condemnatio pecuniæ duplicem significationem habet. (g) Est enim una cum aliqua præfinitione, quæ vulgo dicitur cum taxatione, (h) velut si incertum aliquid petamus; nam illic ima parte formulæ ita est: "Ejus judex Numerium Negidium Aulo Agerio dumtaxat x milia condemna. Si non paret,*

49. The *condemnatio* inserted in the formula is either for a certain or for an uncertain sum of money.

50. The *condemnatio* is for a certain sum in that formula by which we claim a definite amount; for in this case the last part of the formula is as follows: "*Judex condemn Numerius Negidius to Aulus Agerius in the sum of ten thousand sesterces. If it does not appear, absolve him.*"

51. The *condemnatio* for an undetermined sum of money is expressed in two ways. There is in one case the previous determination of a *maximum* sum, and this is commonly called *cum taxatione*; for example, if anyone claim an uncertain sum; for then the last part of the formula is as follows: "*Judex cou-*

absolve." *Diversa est quæ infinita est, velut si rem aliquam a possidente nostram esse petamus, id est si in rem agamus, vel ad exhibendum; nam illic ita est: "Quanti ea res erit tantam pecuniam judex Numerium Negidium Aulo Agerio condemna. Si non paret, absolvito."*

demn Numerius Negidius to Aulus Agerius to the extent of ten thousand sesterces. If it does not appear, absolve him." The unlimited condemnation is different, for example, if we claim anything as ours from anyone in possession of it, that is to say, if we proceed by the *actio in rem*, or *ad exhibendum*; for then the condemnation is as follows: "Whatever the value of the thing may be, let the judex condemn Numerius Negidius in this sum to Aulus Agerius. If he is not liable, absolve him."

(g) Sometimes the Condemnatio determined exactly the precise amount that the judge was to give as damages in the event of his sentence being for the plaintiff. Sometimes it fixed a limit which he was not allowed on any account to exceed. Sometimes the Prætor imposed upon the judge a more vague and uncertain limit, to be ascertained and fixed by the judex himself. Thus he might be instructed in the formula to condemn the defendant to the extent of the profits that he had made. When the Condemnation did not fix the precise sum which the judge should pronounce against the defendant, and left him only a certain latitude of discretion, the Condemnation was said to be taxed. A taxed Condemnation was of two kinds. One that fixed the maximum, which, as we have seen, the judge was not allowed to exceed, and another which was indefinite as the judge was required to calculate the profit made in business by the defendant, or the amount of his *peculium*.

As the rule, the judge in his estimate *in stricta judicia*, of the value of the things, and where the words "*quanti ea res est*" were used, made his calculation of the value at the time of the *litis contestatio*. In "*arbitrariæ actiones*" the rule was different, as the pecuniary calculation had to be made at a future time. It was not the thing itself that was ordered to be restored by the *arbitratu judicis* but the arbitra-

tion decided the amount of compensation, and hence we find the words of the formula, "*Quanti ea res erit.*" Again, in the case of *bonæ fidei judicia*, the principle which regulated the calculation was the *tempus rei judicandæ*. The same rule also held good in regard to the "in factum actiones," in consequence of the terms of the condemnation being, as we learn from Gaius, "*Quanti ea res erit.*" iv. 47. It is doubtful how the passage in the Digest which refers to the case of the *Condictio* is to be taken. Ulpianus says "In hac actione (that is, the *Condictio*) si quærat, res, quæ petita est, cujus temporis æstimationem recipiat, verius est, quod Servius ait, *Condemnationis tempus spectandum.*" l. 3. Dig. de cond. trit. (13. 3.) Savigny understood by the term *Condemnatio*, the "*pars formulæ.*" Huschke has proposed to read for "*Condemnationis tempus,*" "*Contestationis tempus.*" Rudorff thinks that the passage cited, does not contrast the period of the "*litis contestatio*" with that of the judgment; hence, according to his opinion, it refers to the latter; that is to say, to the time when the *Judex* pronounced the sentence. See Domenget in loco. Puchta's Instit. vol. ii. p. 184. Savigny System, vi. ss. 275, 276. Rudorff in Puchta, note l fol. cit.

(h) *Cum taxatione.* In litibus quoque arbitrove cum proscribitur, quoad ei jus sit statuendi, taxatio dicitur, quæ sit certæ summæ." Festus sub voc. "Taxat." By *Taxatio* is to be understood the "*Condemnatio taxatæ quantitatis.*" l. 3. Cod. de inutil. stip. (8. 39.)

52. Qui de re vero est iudex si condemnat, certam pecuniam condemnare debet, etsi certa pecunia in condemnatione posita non sit. Debet autem iudex attendere, ut cum certæ pecuniæ condemnatio posita sit, neque majoris neque minoris summa petita condemnet, alioquin litem suam facit. Item si taxatio posita sit, ne plurius condemnet quam

52. But if he who is appointed judge in a matter condemn, he must condemn in a definite amount; even if a fixed sum is not placed in the *condemnatio*. But the judge ought to be careful, that when a definite sum is placed in the *condemnatio*, he condemn for neither more nor less than the sum claimed, otherwise he makes the process his own (*litem*

taxatum sit, alias enim similiter litem suam facit. Minoris autem damnare ei permissum est. . . . (i)

suam facit); again, if a limiting clause is introduced he ought not to go beyond the limit, for otherwise in a similar manner he makes the process his own. But he is permitted to condemn in a less sum. . . .

(i) At the close of this section almost seven lines are wanting. About the middle of the *lacuna* the following words are legible: "Formulas . . . intendere debent . . . condemnatione constringi." Huschke has made an attempt to restore the passage by conjecture. He says, "Partim ad sententiam restitui notatum puta inter alia atque eandem dari oportere." iii. 147. See also s. 64. fin. His proposed reading is as follows: "Atqui si infinita sit condemnatio, quanti velit, iudex condemnare potest. Unde quibus certæ pecuniæ datur formula, eandem dari oportere intendere debent, quia iudex tum etiam certa condemnatione constringitur. Quod si aliud certum quid præter pecuniam petitur, tantum intentio iudicem constringit, quia non aliter condemnare potest, quam si id ipsum, quod intenditur, paret dari oportere." Gaius in loco.

53. Si quis intentione plus complexus fuerit; causa cadit, id est rem perdit, nec a Prætorē in integrum restituitur, præterquam quibusdam casibus in quibus Prætor edicto succurrit [1¾ lin. des.] (j) Plus autem quatuor modis petitur: re, tempore, loco, causa [Desunt 11 linæ] petere id etiam non adjecto loco.

53. If a party has claimed more in the *intentio* than is due, he is non-suited, (*causa cadit*) that is, he loses his action, nor will he obtain the *in integrum restitutio* from the Prætor, except in certain cases in which the Prætor aids by his edict. A man may claim more than he is entitled to in four ways; as to the object (*re*) the time (*tempore*) the place (*loco*) and the cause (*causa*) . . . he may also claim it without specifying the place.

JUST. IV. 6. 33.

53a. Causa plus petitur, velut si quis in intentione tollat electionem debitoris quam is habet obligationis

53a. More is claimed as to the cause, for example, if any one in the *intentio* take away from the debtor the right

jure. Velut si quis ita stipulatus sit: "Sestertium x milia aut hominem Stichum darespondes?" Deinde alterutrum ex his petat; nam quamvis petat quod minus est, plus tamen petere videtur, quia potest adversarius interdum facilius id præstare quod non petitur. Similiter si quis genus stipulatus sit, deinde speciem petat. Velut si quis *purpuram* stipulatus sit generaliter, deinde Tyriam specialiter petat: quin etiam licet vilissimam petat, idem juris est propter eam rationem quam proxime diximus. Idem juris est si quis generaliter hominem stipulatus sit, deinde nominatim aliquem petat, velut Stichum, quamvis vilissimum. Itaque sicut ipsa stipulatio concepta est, ita et intentio formulæ concepi debet.

of choice, which he may have under the obligation. For example, if anyone have thus stipulated, "Do you promise to give ten thousand sesterces, or the slave *Stichus*?" and then the plaintiff claims the one or the other of these, for although he claim less in value, still he is regarded as claiming more, because it is sometimes easier for the adversary to perform that which is not claimed. In a similar manner, if any one had stipulated for a certain *genus*, and then a certain *species* be claimed. For example, if any one have stipulated for purple in general, and afterwards Tyrian purple be specially claimed; even if he also claim the cheapest, the same rule applies on account of the reason we have already given. Again, the same rule of law governs, if anyone have stipulated generally in regard to a slave, and then the plaintiff claim a certain slave by name, as, for example, *Stichus*, although he may be of very little value. Therefore, the *intentio* in the formula must be prescribed in the very same terms as the *stipulatio* itself.

JUST. iv. 6. 33.

(j) At the commencement of the section after the words "edicto succurrit," Huschke proposes to read, "Velut si minor xxv annorum propter ætatem aut major magna causa justî erroris intervenientis lapsus sit." From line 14 to 24 pagina lxvib. Cod. Ver. only the following words are legible: line 14, "quæ enim;" line 15, "ex parte res est, totam rem;" line 18, "dari promissum;" line 20, "dare spondes? dare spondeo;" line 22, "dare plus."

Upon the "Plus-petitio," Paulus says, "(*Plus petendo*) causa cadimus aut loco, aut summa, aut tempore, aut qualitate: loco, alibi; summa, majorem; tempore ante petendo, quam debetur; qualitate, debiti generis speciem licet vilio-

rem postulando." Recep. Sent. i. 10. 1. See also the "Veteris cujusdam jureconsulti Consultatio," cap. v., where this subject is treated more fully.

Gneist says "Lacunam vers. 11—24 huj. pag. Cod. Ver. Heffter ex Justiniani Institutionibus et paucis verbis certis ita restituere conatus est," and fills up the larger lacunæ as follows:—

"Propter ætatem, vel si tam magna causa justî erroris inter venerit, ut etiam constantissimus quisque labi posset. Plus autem quatuor modis petitur: re, tempore, loco, causa. Re, veluti si quis pro x milibus, quæ ei debebantur, xx milia petierit, aut si is cujus ex parte res est totam rem vel majore ex parte suam esse intenderit. Tempore: veluti si quis ante diem vel conditionem petierit. Loco plus petitur: veluti cum quis id quod certo loco dari promissum erat alio loco petit, sine commemoratione ejus loci. Verbi gratia si in stipulatione ita erat; x milia Capuæ dare spondes? Dare spondeo, deinde detracta loci mentione x milia Romæ pure intenderit: Si paret N. N. A. A. x milia S. S. dare oportere. Plus repetere enim intellegitur, quia promissori pura intentione utilitatem adimit, quam haberet, si Capuæ solveret. Si quis tamen eo loco agat quo dari promissum est, potest petere." See also Huschke, Gaius in loco, who gives a somewhat different reading.

54. Illud satis apparet in incertis formulis plus peti non posse, quia, cum certa quantitas non petatur, sed quidquid adversarium dare, facere oporteret intendatur, nemo potest plus intendere. Idem juris est, et si in rem incertæ partis actio data sit; velut si heres "quantam partem" petat "in eo fundum, quo de agitur, paret ipsius esse:" quod genus actionis in paucissimis causis dari solet.

54. Thus it appears clearly that in the *formulae* in which the *intentio* is for an *incerta* (in *incertis formulis*) more than is due cannot be claimed, because when a definite quantity is not claimed, but that which the defendant ought to give or to do is demanded, (*quidquid adversarium dare facere oporteret*) no one can thus demand more than is due. The same rule of law applies if an action *in rem* be given for an uncertain part; for example, if an heir claim "so much of the land" which is the

object of the suit "as he shall appear to be entitled to," which kind of action is given but in very few cases.

55. Item palam est, si quis aliud pro alio intenderit, nihil eum periclitari eumque ex integro agere posse, quia nihil in *judicium deducitur*, velut (k) si is qui hominem Stichum petere deberet, Erotem petierit; aut si quis ex testamento dare sibi (l) oportere intenderit, cui ex stipulatu debebatur; aut si cognitor aut procurator intenderit sibi dare oportere.

55. Again it is evident that if anyone demands one thing for another, he incurs no danger and does not lose the right to sue again, because nothing is brought into *judicium*; for example, if he who ought to demand the slave Stichus have demanded Eros: or if a person to whom a debt was due, by virtue of a stipulation had claimed on the ground of a testament, or if a *cognitor* or *procurator* had claimed something as his due (*sibi dare oportere*).

JUST. iv. 6. 35.

(k) In the lacuna Unterholzner and Hollweg propose to read, "*nihil in judicium deducitur*." Huschke prefers the reading, "*cum re etiam antiqua actio remanet*." Gneist as will be seen from the text, has adopted the reading of Unterholzner. Huschke calls attention to the circumstance that the phrase "*nihil in judicium deducitur*" occurs in the fifty-eighth section. Huschke's Gai. in loco, note 82.

(l) *Si quis ex testamento dare, etc.* Quintilianus says, "certam pecuniam peto ex stipulatione legatum peto ex testamento." Orat. iv. 2. But in this passage he was not speaking of the formula employed in the actio, but simply of the elucidation of the orator, which was sometimes so simple, that it may be said to have been a mere *propositio*.

The statement made by Gaius in the text, must be taken with some limitation, inasmuch as the plaintiff could not in one action introduce the proof that belonged to another; but it did not vitiate the process, if another cause of action were inserted in the process. Indeed it might be advantageous to the plaintiff, as it would prove that the ground of obligation presented in the latter action had not been made the subject of a suit, and consequently had not been judi-

cially pronounced upon. The plaintiff could therefore not be met by the plea of *res judicata*. See Puchta's Instit. vol. ii. p. 145. *d*.

56. *Sed plus quidem intendere, sicut supra diximus, periculosum est; minus autem intendere licet; sed de reliquo intra ejusdem præturam agere non permittitur. Nam qui ita agit per exceptionem excluditur, quæ exceptio appellatur litis dividuæ. (m)*

56. But it is dangerous, as we have said above, to demand more than is due; but we may sue for less: still it is not permitted to sue for the balance in the court of the same Prætor. For he who thus sues is excluded by an *exceptio*, which is called *litis dividuæ*.

JUST. IV. 6. 34.

(*m*) There was no *plus petitio* when the plaintiff demanded less than was due to him, but at the time of Gaius the plaintiff who did so was not allowed to sue for the balance of his claim "*intra ejusdem præturam*," and if he did so he was met by the plea "*litis dividuæ*." The law was altered in this respect subsequently by a constitution of the emperor Zeno, who empowered the judge to condemn the defendant in the same action to pay the remainder of what might be due to the plaintiff. For example, if the plaintiff sued for five aurei when ten were really due to him, the judge might condemn for the balance. s. 34. Instit. de oblig. (4. 6.)

57. *At si in condemnatione plus petitum sit quam oportet, actoris quidem periculum nullum est, sed si iniquam formulam acceperit, in integrum restituitur, ut minuatur condemnatio. Si vero minus positum fuerit quam oportet, hoc solum consequitur quod posuit: nam tota quidem res in judicium deducitur, constringitur autem condemnationis fine, quam iudex egredi non potest. Nec ex ea parte Prætor in integrum restituit: facilius enim reis Prætor succurrit quam actoribus. Loquimur autem exceptis minoribus xxv anno-*

57. But if on the other hand more has been demanded in the condemnation than is due, the plaintiff does not run any risk, for if the defendant has accepted an unfair formula, he may avail himself of the *in integrum restitutio* to lessen the condemnation. But if less is placed in the condemnation than should be, the plaintiff obtains only that which is thus placed; for the whole matter indeed is brought before the judge (*in judicium deducitur*) who is bound by the end of the *condemnatio* from which he cannot depart. Nor does the Prætor

rum; nam hujus ætatis hominibus in omnibus rebus lapsis Prætor succurrit. (n)

accord the *in integrum restitutio* on account of this part of the formula; for the Prætor renders his assistance more readily to the defendants than to the plaintiffs. We are speaking here not in regard to minors under twenty-five years of age, for in regard to persons of this age the Prætor gives relief in all cases where they have suffered by default.

(n) When anyone through unpardonable negligence in the process suffered some legal disadvantage, the law would not come to his assistance and unsettle its decision. It was for the benefit of the State that the sentence of the Judex should be final. The law, however, helped the defendant, if in the formula, the *Condemnatio* gave too high a sum, for it was held that the plaintiff was answerable to a certain extent for its composition. But it did not, in the time of Gaius, aid the plaintiff who had placed too small a sum in the *Condemnatio*, with the exception of a minor, whose age was considered as a ground of excuse for his carelessness. Domenget thinks that in spite of the general terms in which the text is expressed, it seems difficult to admit that if a *Condemnation* had been wrongly prescribed, either by error of fact or by any inadvertence on the part of the magistrate, the plaintiff was not able to rectify it, even after the sentence was pronounced by the judge. The cases, however, cited by Domenget are all exceptional, and the general rule of law was no doubt as stated by Gaius. Domenget in loco, ss. 5, 6. *Instit. de hered. qual. et dif.* (2. 19.) *Instit. s. 5. de action.* (4. 6.) Puchta's *Instit.* vol. ii. p. 221. and also note a.

58. Si in demonstratione plus aut minus positum sit, nihil in iudicium deducitur, et ideo res in integro manet: et hoc est quod dicitur falsa demonstratione rem non periri.

58. If a greater or less sum is placed in the *Demonstration* than is due, nothing at all is brought before the Judex and hence the matter remains in its former condition: and this is what is denoted by the phrase "by a false *Demonstration* the thing is not lost."

59. Sed sunt qui putant minus recte comprehendere. Nam qui forte Stichum et Erotem emerit, recte videtur ita demonstrare: "Quod ego de te hominem Erotem emi," et si velit, de Sticho alia formula idem agat, quia verum est eum qui duos emerit singulos *quaque* emisse: idque ita maxime Labeoni visum est. Sed si is qui unum emerit de duobus egerit, falsum demonstrat. Idem et in aliis actionibus est, velut commodati, depositi. (o)

59. But there are some who think that the Demonstration is right when less is demanded. For he who has perchance bought both Stichus and Eros appears to compose the Demonstration correctly when he says, "Whereas I have bought the slave Eros of you," and if he wishes, he can sue for Stichus in the same way by means of another formula, because it is true that he who has bought two has bought also each one: such was certainly the opinion of Labeo. But the Demonstration is false if a man claims two when he has only purchased one. The same is also the case in other actions, for example, in the *actio commodati* and *depositi*.

(o) If too large or too small a sum were stated in the Demonstratio it had no influence, as it was rectified by the Judex, without having recourse to the "in integrum restitutio," and without the interference of the Prætor; hence the maxim, "Falsa Demonstratio non nocet." Many jurists however, have maintained that there were exceptions to the rule in the case of those actions which involved *infamia* to the defendant. For example, a plaintiff brings an action against a depositary, and affirms that he had deposited two things with him, a statement which was in point of fact true. Shall the defendant become infamous if the Judex condemn him only for one of the things which had been deposited with him, which thing the defendant would have restored if the plaintiff had limited his demand to it. Does not, it is asked, justice require that the judge should nonsuit the plaintiff who by his action has so thoughtlessly imperilled the honour of the defendant? The prevailing opinion has decided against this exception, at least, as far as the "*actio depositi in jus concepta*" is concerned. Since the defendant had the power, if he were disposed, to perform that part of the contract to which he admitted the plaintiff was

entitled, by this means avoiding an injurious judgment. The rule was different in the case of a false Demonstratio of fact in a "formula in factum concepta;" here the plaintiff had to bear the consequences of his erroneous statement, since the Demonstratio of a fact in the formula availed as an Intentio. When the formula was "in factum concepta," the Intentio was, so to speak, blended with the Demonstratio, and the effect was, that if more than was due were claimed in the Demonstratio, it was held that more was also demanded in the Intentio. See Puchta's Instit. vol. ii. pp. 148, 149, notes *u*, *v*, *w*, *x*, and the authorities referred to there. Domenget in loco.

60. Sed *nos* aput quosdam scriptum invenimus, in actione depositi et denique in ceteris omnibus quibus damnatus unusquisque ignominia notatur, eum qui plus quam oporteret demonstraverit litem perdere. Velut si quis una re deposita duas res deposuisse demonstraverit, aut si is cui pugno mala percussa est in actione injuriarum esse aliam partem corporis percussam sibi demonstraverit. Quod an debeamus credere verius esse, diligentius requiremus. Certe cum duæ sint depositi formulæ, alia in jus concepta, alia in factum, sicut supra quoque notavimus, et in ea quidem formula quæ in jus concepta est, initio res de qua agitur demonstratur, tum designetur, deinde inferatur juris contentio his verbis: "Quidquid ob eam rem illum mihi dare facere oportet;" in ea vere quæ in factum concepta est statim initio intentionis loco res de qua agitur designetur his verbis: "Si paret illum aput illum rem illam deposuisse:" dubitare non debemus, quin si quis in formula quæ in factum composita est plures res designaverit quam depo-

60. But we find that some have written that in the *actio depositi*, and indeed in all those where the *condemnatio* involves infamy, he who has claimed in the Demonstration more than he ought, loses the suit. For example, if anyone who has deposited a single article declares in the Demonstration that he has deposited two things, or if one who has been smitten on the cheek declares in the Demonstration in an action for injury that he was struck on some other part of the body. But if we would be more firmly convinced, we ought to investigate more diligently. Since indeed there are two formulæ in an *actio depositi*, the one in *jus concepta*, the other in *factum*, as we have already observed, and in that formula which is in *jus concepta*, the Demonstration of the thing which is the object of the suit, occupies the first place, then the thing is described, and afterwards the legal claim is introduced in the following words, "Whatever on account of that thing he ought to give me or to do for me;" whilst in the formula conceived in *factum*,

suerit, *litem* perdat, quia in intentione plus po . . . (p)

immediately, at the commencement, in the place of the Intentio, the thing which is the object of the suit is described in these words, "If it shall appear that he has deposited with him that thing," we cannot doubt that if in a formula composed in *factum*, any one shall have described more things than he has deposited, he loses the suit, because he has re-claimed in the Intentio more than he ought

(p) Two entire pages of the MS. are lost, containing 48 lines. They are numbered lxxi b. and lxviii a. Huschke says, "Sententiam perfeci.—in p. 210 et 211. quid perierit æstimari potest ex eo, quod jam in Just. Institutionibus sequitur s. 36. de action. (4. 6.) Sunt præterea quædam actiones, quibus non semper solidum, quod nobis debetur, persequimur sed modo solidum consequimur, modo minus. Utece, si in peculium filii servive agamus. Nam si non minus in peculio sit, quam persequimur, in solidum pater dominusve condemnatur; si vero minus inveniatur, eatenus condemnatur iudex, quatenus in peculio sit. Quemadmodum autem peculium intelligi debeat, suo ordine proponemus. (cf. iv. 69. 73) Item si de dote iudicio mulier agat, placet, eatenus maritum condemnari debere, quatenus facere possit, id est, quatenus facultates ejus patiuntur. Itaque si dotis quantitati concurrant facultates ejus, in solidum damnatur; si minus, in tantum, quantum facere potest. Propter retentionem quoque dotis repetitio minuitur; nam ob impensas in res dotales factas marito retentio concessa est, quia ipso jure necessariis sumptibus dos minuitur, sicut ex latioribus Digestorum libris cognoscere licet (cf. Ulp. 6). Sed et si quis cum parente suo patronove agat, item si socius cum socio iudicio societatis agat, non plus actor consequitur, quam adversarius ejus facere potest. Idem est, si quis ex donatione sua conveniatur. Compensationes quoque oppositæ plerumque efficiunt, ut minus quisque consequatur,

quam ei debebatur: namque ex bono et æquo habita ratione ejus, quod invicem actorem ex eadem causa præstare oporteret, judex in reliquum eum, cum quo actum est, condemnat, sicut jam dictum est."

61. In bonæ fidei judiciis libera potestas permitti videtur judici ex bono et æquo æstimandi quantum actori restitui debeat. In quo et illud continetur, ut habita ratione ejus quod invicem actorem ex eadem causa præstare oporteret, in reliquum eum cum quo actum est condemnare debeat.

61. But in all actions *bonæ fidei*, full power is given to the judge to determine *ex bono et æquo*, how much ought to be restored to the plaintiff. Whence it follows, that after having admitted the demand, the plaintiff ought in his turn, by virtue of the same legal principle, to perform his part, and the judge should condemn the defendant in the balance only.

62. Sunt autem bonæ fidei judicia hæc: ex empto vendito, locato conducto, negotiorum gestorum, (q) mandati, depositi, fiduciæ, pro socio, tutelæ, commodati.

62. But the following are the *bonæ fidei* actions: those arising out of bargain and sale, letting and hiring, the voluntary undertaking of another's affairs, a mandate, a deposit, trusts (*fiduciæ*), partnership, guardianships, loans (*commodati*).

(q) The *Negotiorum gestor* was one who "sine mandato negotiorum administrationem suscepit." l. 5. pr. Dig. de oblig. et action. (44. 7.) Gai. ii. 56. note a, 60. note b.

According to the ancient law, in the case of an *emancipatio*, or an *in jure cessio*, there was an implied contract for the emancipation of the object, from which originated the most ancient kind of pledge. The debtor indeed was bound to the creditor "cum fiducia sive fiduciæ causa," that is, by an agreement that the creditor after the extinction of his debt should remancipate the object he had received as a pledge. The "*actio fiduciæ*" was the action corresponding to this contract, and was available both for the debtor and the creditor; for the former, to enable him to obtain the remancipation of the object he had pledged; and for the

latter, to recover compensation for any outlay he had made on the object whilst in his possession.

63. *Tamen iudici (r) . . . compensationis rationem habere non ipsius formulæ verbis præcipitur; sed quia id bonæ fidei iudicio conveniens videtur, ideo officio ejus contineri creditur.*

63. Yet [in these actions] the judge is not instructed by the words of the formula to settle the amount of compensation; but because his doing so seems consistent with a judgment given *fidei bonæ*, it is believed to be included within his duty.

(*r*) Huschke, referring to the Institutes of Justinian s. 28 de act. (4. 6.), in which there is given the division of actiones into “*bonæ fidei*” and “*stricti juris*,” proposes to restore the close of section 62 as follows, “*tutelæ, commodati, pignoris datio, familiæ erciscundæ, communi dividundo, præscriptis verbis.*” Lachmann, Boecking, Gneist, and most of the editors commence section 63 with the word, “*tamen*,” which Huschke says cannot possibly be right. Gaius never commences a sentence with “*tamen*.” Huschke proposes to read, “*Judici tamen horum bonæ fidei judiciarum compensationes rationem habere non quidem formulæ verbis præcipitur.*” Huschke’s *Kritik*, pp. 171—173.

64. *Alia causa est illius actionis qua argentarius experitur: nam is cogitur cum compensatione agere, id est ut compensatio verbis formulæ comprehendatur. Itaque argentarius ab initio compensatione facta minus intendit sibi dare oportere. Ecce enim si sestertium x milia debeat Titio, atque ei xx debeat Titius, ita intendit: “si paret Titium sibi x milia dare oportere amplius quam ipse Titio debet.” (s)*

64. It is otherwise as to the action with which the banker (*argentarius*) proceeds: for he is compelled to sue with compensation (*cum compensatione*), that is to say, to include the compensation in the words of the formula. Hence, the banker having made compensation from the beginning, demands only the balance in the *Intentio*. Thus, if he is indebted to Titius, ten thousand sesterces, and Titius owes him twenty thousand, the *Intentio* runs thus: “If it appears that Titius ought to give to him ten thousand more than he himself is indebted to Titius.”

(s) By “minus intendit sibi dare oportere,” Gaius means that the Banker sued for the balance after having given credit for his own debt. The Argentarius was a Banker, who was authorised by the State to carry on publicly pecuniary transactions, in a place specially appointed (*taberna*). The business of the Argentarius was principally to receive money *in depositum*, to lend money, to make payments for third parties, to undertake obligatory payments, to sell things by auction, and to collect the purchase money. It was further the duty of the Argentarius to keep a special account-book for each of his customers, and to enter carefully all receipts and disbursements. His account was binding upon all parties whose pecuniary affairs he managed. Puchta's Instit. vol. iii. p. 102. l. 8. Dig. de edendo. (2. 13.) l. 24. s. 2. Dig. de rebus auctor. jud. possid. etc., (42. 5.) l. 88. Dig. de solut. et liberat. (46. 3.) Nov. 136. where the Argentarii are called ἀργυρόπαραι. Hermann's Handlexicon, sub voce “Argentarius.”

65. Item . . bonorum emptor cum deductione agere debet, id est ut in hoc solum adversarius condemnatur quod superest, deductio eo quod invicem sibi defraudatoris nomine debetur. (t)

65. Further, the *bonorum emptor* must also sue *cum deductione*, that is to say, so that his opponent shall be condemned in only the balance that remains after deducting that which is due to him (the *bonorum emptor*) on account of the fraud.

(t) Instead of “debet” Blume proposed to read “jubet,” which Huschke approves, as it agrees with the marks in the MS., and corresponds with the sentence “nam is cogitur compensatione agere” in s. 64. Again, Huschke thinks that at the commencement of this section where the MS. reads “Item debe,” the transcriber did not understand the signs, and that he thought the word “debet,” which closes the previous sentence, was to be repeated after the word “item.” Huschke conjectures that the first two letters in the word “debe” have been inserted, and that the cor-

rect reading is "Item ed b. e." the equivalent for "Item edicto bonorum emptor." Again, at the close of the sentence the MS. reads, "Tibi defraudatoris nomine debet," a reading Huschke affirms without meaning. This has been corrected to "Sibi—debetur," which he thinks from the meaning of the passage would refer much more to the plaintiff, *bonorum emptor*, than to the *adversarius* or defendant. The true reading, in the opinion of the critic, is "ei b. e." for "ei bonorum emptor," to be taken with "debet" the reading of the MS. which should be restored to the text. Huschke's *Kritik*, p. 174.

66. Inter compensationem autem quæ argentario interponitur, et deductionem quæ obicitur *bonorum emptori*, illa differentia est, quod in compensationem hoc solum vocatur quod ejusdem generis et naturæ est. Veluti pecunia cum pecunia compensatur, triticum cum tritico, vinum cum vino: adeo ut quibusdam placeat non omni modo vinum cum vino, aut triticum cum tritico compensandum, sed ita si ejusdem naturæ qualitatisque sit. In deductionem autem vocatur et quod non est ejusdem generis. Itaque si a *Titio* pecuniam (*u*) petat bonorum emptor, et invicem frumentum aut vinum *Titio* debeat, deducto quanti id erit, in reliquum experitur. (*v*)

66. But between the compensation which the banker (*argentarius*) is bound to make, and the deduction which is set off by the *bonorum emptor*, there is this difference; that in the compensation only debts of the same kind and of the same nature are admitted. As, for example, money is compensated with money, wheat with wheat, wine with wine; on which account according to the opinion of some, wine cannot be compensated with every kind of wine, nor wheat with every kind of wheat, but they must be of the same kind and quality. In deduction, however on the other hand, things are comprehended which are not of the same kind. Hence, if the *bonorum emptor* claims money whilst he himself is indebted in corn or wine, having deducted the value of this corn or wine, he brings his action only for the balance.

(*u*) Gneist has accepted in the main Huschke's emendation. In his *Kritik*, Huschke proposed to read, "itaque si velut pecuniam," and gave as the reason, that Gaius always used an introductory word before his examples, such as *ecce* and *veluti*. In his recent edition of Gaius he has not followed in this particular his own emendation. At the close of the

section he proposed to read, "deducto a pecunia quanti id erit," which he has retained in his text. He says, "ex codice addidi." Gaius, p. 175. For the ingenious manner in which the present text has been emended, see Huschke's *Kritik*, p. 175.

(v) *Compensatio* is said to take place when a claim and a counter claim are considered in the payment assessed by the judge. Paulus says, "*Compensatio debiti ex pari specie et causa dispari admittitur: velut si pecuniam tibi debeam et tu mihi pecuniam debeas, aut frumentum aut cetera hujusmodi, licet ex diverso contractu, compensare vel deducere debes; si totum petas plus petendo causa cadis.*" *Recep. Sent. ii. 5. 3.*

No *Compensatio* was admissible in the case of a deposit. Thus, the same great Jurist says, "*In causa depositi Compensationi locus non est, sed res ipsa reddenda est.*" *Ibid. ii. 12.* Again, Modestinus tersely observes: "*Compensatio est debiti et crediti inter se contributio.*" l. 1. *Dig. de compens. (16. 2.)* Until a rescript by M. Aurelius, *Compensatio* could only take place in *bonæ fidei judiciis*, and *ex eadem causa*, but by virtue of the rescript it became applicable in *stricti juris judiciis; doli mali exceptione*. There could be no *Compensatio* when the claim of the plaintiff could be answered by a peremptory plea (*exceptio peremptoria*), for the *Compensatio* admitted the demand, and simply claimed the set off. Javolenus says, "*Quæcunque per exceptionem perimi possunt, in compensationem non veniunt.*" l. 14. *tit. cit. (16. 2.)* The plea (*exceptio*) stated matter in bar of the demand. *Dig. de comp. (16. 2.)* l. 76. *Dig. de verb. sig. (50. 16.)* *Cod. de comp. (4. 31.)* ss. 30. 39. *Instit. de action. (4. 6.)*

67. Item vocatur in deductionem et id quod in diem debetur; compensatur autem hoc solum quod præsentis die debetur.

67. Again, under deduction is comprehended that which is due at a specified future time (*in diem*); under compensation that only which is due at the present moment.

68. *Præterea compensationis quidem ratio in intentione ponitur: quo fit, ut si facta compensatione plus nummo uno intendat argentarius, causa cadat et ob id rem perdat. Deductio vero ad condemnationem ponitur, quo loco plus petenti periculum non intervenit: utique bonorum emptore agente, qui licet de certa pecunia agat, incerti tamen condemnationem concipit.*

69. *Quia tamen superius mentionem habuimus de actione qua in peculium filiorumfamilias servorumque agatur, opus est, ut de hac actione et de ceteris quæ eorundem nomine in parentes dominosve dari solent diligentius admoneamus. (w)*

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68. Moreover, the claim for compensation is placed in the *intentio*; and hence it follows, that if the banker, after making the *compensatio*, claims in the *intentio* a single coin more than is his due, the process is invalid, and on account of this he loses his suit. On the other hand, the deduction is placed in the *condemnatio*, where an excess in the claim does not endanger the suit; at least, when a *bonorum emptor* sues, who, although suing for a definite sum, yet draws up the *condemnatio* for an indefinite amount.

69. Since we have made mention above of the action which is employed in a suit for the *peculium* of sons (*filiifamilias*) and of slaves, it is necessary to consider more carefully this action, and others which in the names of the sons or slaves are usually employed against their *parentes* or masters.

(w) The father and master, who were made responsible for the debts of the *filiusfamilias* or the slave, were regarded as a species of *accessory* debtors. Paulus says: "*Filiusfamilias qui jussu patris promisit—quasi accessionem intellegimus eum qui jubeat.*" l. 91. s. 5. Dig. de verb. oblig. (45. 1). Thus the Prætor gave an action against the master of a slave who had contracted *jussu domini*. s. 1. Instit. Quod cum eo cont. etc. (4. 7.) This liability however was not universal, but depended upon special circumstances. It was to these special circumstances that the expression *adjecticia qualitas* was applied. The actions given by the Prætor were, as already observed, called "*actiones adjecticiæ qualitatæ.*" The *potestas* as such was no ground of obligation to bind the *paterfamilias* for the debts of those subject to his authority. l. 5. pr. Dig. quod jussu (15. 4.) Puchta's Instit. vol. iii. p. 55. and note c.

70. Imprimis itaque si jussu patris dominive negotium gestum erit, in solidum Prætor actionem in patrem dominumve comparavit: (x) et recte, quia qui ita negotium gerit magis patris dominive quam filii servive fidem sequitur.

70. In the first place, therefore, if by the order of the father or the master, a transaction is entered into [by a son or a slave], the Prætor gives an action for the whole amount (*in solidum*) against the father or the master; and with justice, because he who has contracted, in this case, with the son (*filius-familias*) or the slave, trusts more to the credit of the father or the master, than to that of the son or slave.

(x) The action thus given by the prætor against the parent or the master was known as the “*actio quod jussu*.”

71. Eadem ratione comparavit duas alias actiones, exercitoriam et institoriam. Tunc autem exercitoria locum habet, cum pater dominusve filium servumve magistrum navis præposuerit, et quod cum eo ejus rei gratia cui præpositus fuit negotium gestum erit. Cum enim ea quoque res ex voluntate patris dominive contrahi videatur, æquissimum Prætori visum est in solidum actionem dari. Quin etiam, licet extraneum quis quemcumque magistrum navi præposuerit, sive servum sive liberum, tamen ea Prætoriana actio in eum redditur. Ideo autem exercitoria actio appellatur, quia exercitor vocatur is ad quem cottidianus navis quæstus pervenit. Institoria vero formula tum locum habet, cum quis tabernæ aut cuilibet negotiationi filium servumve aut etiam quemlibet extraneum, sive servum sive liberum, præposuerit, et quid cum eo ejus rei gratia cui præpositus est contractum fuerit. Ideo autem institoria appellatur, quia qui tabernæ præponitur institor appellatur. Quæ et ipsa formula in solidum est. (y)

71. For the same reason the Prætor has ordained two other actions, the actions *exercitoria* and *institoria*. The *actio exercitoria* is given when the father or the master has made his son or his slave supercargo of a vessel, and when an agreement has been made with such a one in relation to the business he has been appointed to manage. For since also this transaction appears to be entered into, in accordance with the will of the father or of the master, it appeared to the Prætor to be most equitable to give an action for the whole (*in solidum*). Moreover, if anyone has made a certain third party supercargo (*magister navis*), whether he be a slave or a freeman, still this Prætorian action is given against him. And this action is called *exercitoria* because he is denominated the *exercitor*, to whom the daily profits of a ship belong. The formula *institoria* on the other hand is given when anyone has intrusted his son or his slave, or even a third party, whether a slave or a freeman, with a *taberna* or any particular business, and a con-

tract has been made with him in relation to the business he has been appointed to manage. This action is called *institoria*, because he who is placed at the head of a *taberna* is called *institor*. This formula also proceeds for the whole (*in solidum*).

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(y) As is often the case with us, the owner of a vessel employed a master or captain, whose duty it was to take charge of the vessel whilst at sea, and in addition to the master, whose office it was simply to navigate the vessel, an officer was appointed, answering to our supercargo, who had charge of the cargo, and whose ordinary duty it was to transact the business at the port of destination. He was called the *magister navis*. Ulpianus says, "Magistrum navis accipere debemus cui totius navis cura mandata est." l. 1. s. 1. Dig. de exercit. act. (14. 1). Paulus says, "Cui præcipua cura rerum incumbit, et qui magis quam ceteri diligentiam et sollicitudinem rebus, quibus præsumt, debent, hi magistri appellantur." l. 57. Dig. de verb. sig. (50. 16). Paulus also says, "Quod cum discipulis eorum qui officinis vel tabernis præsumt contractum est, in magistros vel institores tabernæ in solidum actio dabitur." Recep. Sent. ii. 8. 3. Gaius, in his provincial edict says, "Nam et plerique pueros puellasque tabernis præponunt." l. 8. Dig. de inst. act. (14. 3.)

72. Præterea tributaria quoque actio in patrem dominumve Prætoris edicto (c.) de eorum mercibus rebusve constituta est, cum filius servusve in peculiari merce scienti patre dominove negotiatur. Nam si quid cum eo ejus rei causa contractum erit, ita Prætor jus dicit, ut quidquid in his mercibus erit, quodque inde receptum erit, id inter patrem dominumve, si quid ei debetur, et ceteros creditores pro rata portione distribuatur. Et

72. Moreover, the *actio tributaria* is given against the father or the master by the edict of the Prætor, with respect to the merchandise or property of a son or slave; when that son or slave, with the knowledge of his father or master, trades with his *peculium*. For if any contracts are made in the course of this business, the Prætor ordains that the entire produce and profit resulting from the traffic shall be

*quia ipsi patri dominove distributionem permittit, si quis ex creditoribus quæ-
ratur, quasi minus ei tributum sit
quam oportuerit, hanc ei actionem
accommodat, quæ tributoria appel-
latur.*

divided between the father or the master, if anything be due to him, and the rest of the creditors in proportion to their claims. And since the distribution is permitted to be made by the father himself, or by the master, if any creditor complains that he has received less than his due, the Prætor gives him the *actio tributoria*.

JUST. iv. 7. 3.

(z) This is Huschke's reading. Lachmann wishes to read "de peculiaribus mercedibus." Compare what Gaius says in l. 27. pr. Dig. de pecul. (15. 1). The lacuna which occurs from ss. 72 to 74 the editors have not hesitated to supply from the Institutes. Lachmann says, "In reliqua quidem hujus paginæ parte, nec non in universa pag. seq. nihil legi potuit: sed cum, quæ ibi evanuerint, non solum quantum ad sententiam attinet, verum etiam maximam partem verbis tenus servata esse videantur in Inst., lacunam inde explere non dubitavi. Institutionum tamen auctores, ne verbosa fieret disputatio, in solam servi dominique personam direxerunt sermonem; quod cum a Gaii nostri instituto alienum esse animadverterem, filii patrisque mentionem suo quoque loco adjeci. Quæ præterea mutanda visa sint, sequentes notæ indicabunt." In loco, note 31.

73. *Præterea introducta est actio de peculio deque eo quod in rem patris dominive versum erit, ut quamvis sine voluntate patris dominive negotium gestum erit, tamen sive quid in rem ejus versum fuerit, id totum præstare debeat, sive quid non sit in rem ejus versum, id eatenus præstare debeat, quatenus peculium patitur. In rem autem patris dominive versum intellegitur quidquid necessario in rem ejus impenderit filius servusve veluti si mutuatus pecuniam creditoribus ejus solverit, aut ædificia ruentia*

73. The Prætor has, moreover, introduced an action relating to the *peculium* and to those things which turned to the profit of the father, or of the master; as although a contract may have been made without the consent of the father, or of the master, yet if the father or the master has been benefitted, he ought to be held liable to the full extent of the profit, and if no profit has resulted, he ought to be responsible to the amount of the *peculium*. Now that is regarded as having turned to the advantage of the father

fulserit, aut familia frumentum emerit, vel etiam fundum aut quamlibet aliam rem necessariam mercatus erit. Itaque si ex decem ut puta sestertiis quod servus tuus a Titio mutua accepit creditori tuo quinque sestertia solverit, reliqua vero quinque quolibet modo consumpserit, pro quinque quidem in solidum damnari debes, pro ceteris vero quinque eatenus, quatenus in peculio sit: ex quo scilicet apparet, si tota decem sestertia in rem tuam versa fuerint, tota decem sestertia Titium consequi posse. Licet enim una est actio qua de peculio deque eo quod in rem patris dominive versum sit agitur, tamen duas habet condemnationes. Itaque iudex apud quem ea actio agitur ante dispicere solet, an in rem patris dominive versum sit, nec aliter ad peculii estimationem transit, quam si aut nihil in rem patris dominive versum intellegatur, aut non totum. Cum autem quaeritur quantum in peculio sit, ante deducitur quod patri dominove quique in potestate ejus sit a filio servove debetur, et quod superest, hoc solum peculium esse, intellegitur. Aliquando tamen id quod ei debet filius servusve qui in potestate patris dominive est non deducitur ex peculio, velut si is cui debet in hujus ipsius peculio sit. (1)

or of the master, which the son or the slave has laid out in necessary expenditure on his property. For example, if having received money as a *mutuum*, he has paid it to the creditors of his father or master, or if he have repaired dilapidated buildings, or have purchased wheat for the household, or even land, or any other necessary thing. Thus, if out of ten thousand sesterces which your slave has received from Titius as a *mutuum*, he shall pay five thousand to one of your creditors and expend the other five thousand in any other way, you would be condemned to pay the whole of the first five thousand and so much of the other five thousand as the slaves *peculium* amounted to. Hence it appears that if the whole ten thousand sesterces had been spent on your property, Titius could have recovered the whole from you. For, although it is but one *actio* by which the plaintiff proceeds against the *peculium* and against the amount which has accrued to the profit of the father or of the master, yet it has two condemnations. And therefore the judge before whom the action is brought first considers whether any advantage has resulted to the master or the father, and does not proceed to estimate the value of the *peculium* until he has ascertained that no part, or not the whole of the sum due, has been expended for the benefit of the master or of the father. When the value of the *peculium* is thus being ascertained, a deduction is first made of that which is due by the son or the slave to the father, or the master, or anyone under his *potestas*, and the balance only is considered to be the *peculium*. Yet it is sometimes the case that what a son or a slave is indebted to anyone under the *potestas*

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of the father or of the master, is not deducted from the *peculium*, when, for example, he to whom the son or the slave is indebted forms a part of this *peculium*.

(a) The Prætor gave the “*actiones de peculio*” and “*de in rem verso*” against a father or a master in favour of a person who had traded with his son or his slave possessed of a *peculium*, when liability had been incurred without the knowledge of the father or the master. It was, however, not only given to the extent of the *peculium*, if the father or the master had made no profit by the act which had given rise to the action; but also to the extent of the profit which he had derived from it, if any had been made. The Condemnation in this case was *duplex*. The judge in a preliminary investigation ascertained whether there had been profit for the father or the master of the slave and condemned accordingly. In the contrary case the Condemnation was given only to the extent of the *peculium*.

When an action *de peculio* was brought for the amount of the *peculium*, for example, if it were a hundred *aurei*, and the slave to whom it belonged owed fifty to the son of his master or to some other slave under the power of the same master, the judge would then deduct these fifty *aurei*, so that the plaintiff could only recover the remaining fifty. But if the slave to whom the fifty *aurei* were owing happened to be appendant to the *peculium*, being in a sense a part and parcel of it, the judge could not deduct the fifty *aurei* due to the vicarial or subordinate slave, and consequently the plaintiff would get the entire hundred *aurei*. Theophilus assigns the following reason for this: “*Et cum ita se res habeat, non potest vicarius, cujus æstimatione peculium augetur, et ipse illud minuere, eo nomine, quod sibi aliquid debeatur; ne eadem persona duos contrarias habere functiones videatur, ut simul et augeat et minuat peculium.*” s. 4. Instit. quod cum eo. (4. 7.) Theophilus in Harris’s Just. hoc. tit., and Domenget in loco.

74. *Ceterum dubium non est, quin is quoque qui jussu patris dominive contraxerit, cuique institoria vel exercitoria formula competit, de peculio aut de in rem verso agere possit. Sed nemo tam stultus erit, ut qui aliqua illarum actionum sine dubio solidum consequi possit, in difficultatem se deducat probandi (b) in rem patris dominive versum esse, vel habere filium servumve peculium, et tantum habere, ut solidum sibi solvi possit. Is quoque cui tributoria actio competit, de peculio vel de in rem verso agere potest: sed huic sane plerumque expedit, hac potius actione uti quam tributoria. Nam in tributoria ejus solius peculii ratio habetur quod in his mercibus erit, quibus negotiatur filius servusve, quodque inde receptum erit, at in actione peculii, totius: et potest quisque tertia forte aut quarta vel etiam minore parte peculii negotiari maximam vero partem in prædiis vel in aliis rebus habere; longe magis si potest adprobari id quod debeatur totum in rem patris dominive versum esse, ad hanc actionem transire debet. Nam, ut supra diximus, eadem formula et de peculio et de in rem verso agitur.*

JUST. IV. 7. 5.

74. Moreover, there is no doubt but that he who has contracted with a son or slave acting by command of his father or master, and who may sue either by the *formula institoria* or *exercitoria*, may also proceed by the *actio de peculio* or that *de in rem verso*. But no man who, by one of these actions, could without doubt recover the whole, would be so foolish as to draw upon himself the difficulty of proving that profit has resulted to the father or the master, or that the son or the slave has a *peculium*, and that this *peculium* is of sufficient value to meet his entire claim. Further he who is competent to bring the *actio tributoria* may also sue by the *actio de peculio* or *de in rem verso*; but it is clearly more advantageous in most cases for him to proceed by the latter action, than to make use of the *actio tributoria*. For in the *actio tributoria* account will be taken only of that portion of the *peculium* which has been employed in the business that has been carried on by the son or slave, and of whatever has resulted from these transactions; but on the other hand in the *actio de peculio* the entire *peculium* enters into the calculation; and it may be that the slave has engaged in business with the third or the fourth, or perhaps even a smaller part of his *peculium*, whilst the greater part has been invested in land or in other things. But if it can be proved, that what is due has been expended entirely to the advantage of the father or of the master, it is far better that he should have recourse to this action. For as we have said above, we sue by the same formula both in the *actio de peculio* and in that *de in rem verso*.

(b) Before the words placed in *italics*, Huschke says that there is in the MS. manifestly the letter *h*, which he takes to stand for *hac*, and refers to the “*actio de peculio vel in rem verso*.” Huschke’s *Kritik*. p. 175. Gaius now proceeds to consider “NOXAL ACTIONS.”

75. Ex maleficiis filiorum familias servorumve, veluti si furtum fecerint aut injuriam commiserint, noxales actiones proditæ sunt, uti liceret patri dominove aut litis æstimationem suffere aut noxæ dedere: erat enim iniquum nequitiam eorum ultra ipso- rum corpora parentibus dominisve damnosam esse.

JUST. iv. 8. 1.

76. Constitutæ sunt autem noxales actiones aut legibus aut edicto. Legibus, velut furti lege XII tabularum damni injuriæ [velut] lege Aquilia. Edicto Prætoris velut injuriarum et vi bonorum raptorum. (c)

JUST. iv. 8. 4.

75. The offences of children or of slaves, as, if they commit a theft (*furtum*), or injury, give rise to noxal actions; which leave to the father or the master the option either of paying the estimated damages or surrendering the wrong-doer (*noxæ*); for it were inequitable that the offence of a son or a slave should damage the father or the master beyond the value of the persons of the offenders.

76. Noxal actions have been established either by law or by edict; by law, for example, in the case of theft by the law of the Twelve Tables, in the case of wrongful damage by the *lex Aquilia*; and by the edict of the Prætor in the case of injuries and of property taken by force (*vi bonorum raptorum*).

(c) These actions were given to protect a person from wrongs committed by filii-familias, and by slaves. The father and the master of the slave might rid themselves of all liability by abandoning the wrong-doer to the plaintiff. Justinian abolished the law so far as children were concerned, as the custom had already fallen into desuetude. As to the meaning of the term “*Noxa*,” Festus observes, “*Noxia, ut Ser. Sulpicius Rufus ait, damnum significat, apud poetas autem et oratores ponitur pro culpa.*—Item cum lex jubet noxæ dedere, pro peccato dedi jubet.” Sub voce “*Noxia*,” Müller. p. 174. Paulus says, “*Interdicta noxalia ea sunt*

quæ *ob delictum* eorum, quos in potestate habemus, dantur, etc." l. 5. Dig. de intend., etc. (43. l.) Gaius says, "Noxæ appellatione *omne delictum* continetur." l. 238. s. 3. Dig. de verb. sig. (50. 60.) Gai. i. 140. "Noxa autem est corpus quod nocuit." Just. iv. 8. l.

77. Omnes autem noxales actiones capita sequuntur. Nam si filius tuus servusve noxam commiserit, quamdiu in tua potestate est, tecum est actio; si in alterius potestatem pervenerit, cum illo incipit actio esse; si sui juris cœperit esse, directa actio cum ipso est, et noxæ deditio extinguitur. Ex diverso quoque directa actio noxalis esse incipit: nam si paterfamilias noxam commiserit, et hic se in adrogationem tibi dederit aut servus tuus esse cœperit, quod quibusdam casibus accidere primo commentario tradidimus, incipit tecum noxalis actio esse quæ ante directa fuit. (d)

JUST. iv. 8. 7.

77. But all noxal actions are attached to the delinquent himself (*caput sequuntur*). For if your son or your slave has committed an offence so long as he is under your *potestas* the noxal action lies against you; if he shall have come under the *potestas* of another, the action lies against the new master; if the offender has become *sui juris*, an *actio directa* lies against the offender himself, and the claim to the surrender of the wrong-doer is extinguished. On the other hand, the *actio directa* may also become noxal; for if a *paterfamilias* after having committed an offence give himself to you in arrogation, or become your slave (which may happen in certain cases as we have explained in the First Commentary), then the *actio* which was formerly *directa* becomes from that time a noxal action against you.

(d) If the wrong-doer were himself *sui juris*, the action brought by the party injured was said to be *direct*. The word *direct* was employed as we have already seen in several acceptations. Thus the term was applied to an action given by the *jus civile*, as opposed to that given by the prætorian law. An action was also said to be *direct* if it were contrasted with the action which a party had against a co-contractee, which was called *contraria*. See Domenget in loco.

78. Sed si filius patri aut servus domino noxam commiserit, nulla actio nascitur: nulla enim omnino

78. But if a son has committed an offence against his father, or a slave against his master, no action

inter me et eum qui in potestate mea est obligatio nascitur. Ideoque etsi in alienam potestatem pervenerit aut sui juris esse cœperit, neque cum ipso, neque cum eo cujus nunc in potestate est agi potest. Unde quæritur, si alienus servus filiusve noxam commiserit, mihi, et is postea in mea esse cœperit potestate, utrum intercidat actio, an quiescat. Nostri præceptores intercidere putant, quia in eum casum deducta sit in quo actio consistere non potuerit, ideoque licet exierit de mea potestate, agere me non posse. Diversæ scholæ auctores, quamdiu in mea potestate sit, quiescere actionem putant, cum ipse mecum agere non possum; cum vero exierit de mea potestate, tunc eam resuscitari. (e)

JUST. IV. 8. 6.

(e) Justinian adopted the opinion of the Sabinians. After explaining the impropriety of children being surrendered to the party injured, he concludes by saying, "Et ideo placuit, in servos tantummodo noxales actiones esse proponendas, quum apud veteres legum commentatores invenimus sæpius dictum, ipsos filios-familias pro suis delictis posse conveniri."

79. Cum autem filius familias ex noxali causa mancipio datur, diversæ scholæ auctores putant ter eum mancipio dari debere, quia lege xii tabularum cautum sit, ne aliter filius de potestate patris exeat, quam si ter fuerit mancipatus: Sabinus et Cassius ceterique nostræ scholæ auctores sufficere unam mancipationem; cre-

arises; for no obligation exists between me and the person who is under my *potestas*. And so also, although he has come under the *potestas* of another, or has become *sui juris*, no action can be brought either against the man himself, or against him in whose *potestas* he now is. Hence if the slave or son of a third party has committed an offence against me and he afterwards comes under my *potestas*, it is a question whether the right of action is lost or is merely in abeyance. According to the opinion of the doctors of our school, the right of action is lost, since a state of things has arisen in which it cannot exist; and thus I cannot sue even if he subsequently pass from under my *potestas*. The doctors of the opposite school on the other hand are of opinion that so long as the offender is under my *potestas* the action is in abeyance, because I cannot sue myself; but that it revives when he ceases to be under my *potestas*.

79. But when a *filius-familias* is given in *mancipium* in consequence of a noxal action (*ex noxali causa*), the doctors of the opposite school are of opinion that he ought to be given three times in mancipation; since it is ordained by the law of the Twelve Tables that a son shall not pass from under the *potestas* of a father,

diderunt enim tres lege xii tabularum ad voluntarias mancipationes pertinere.

except by a triple mancipation; Sabinus and Cassius with the other doctors of our school held that one *mancipatio* was sufficient; for they were of opinion that the three mancipationes mentioned in the law of the Twelve Tables related to cases of voluntary mancipation.

80. Hæc ita de his personis quæ in potestate sunt, sive ex contractu sive ex maleficio earum controversia esset. Quod vero ad eas personas quæ in manu mancipiove sunt, ita jus dicitur, ut cum ex contractu earum ageretur, nisi ab eo cujus juri subjectæ sint in *solidum* defendantur, bona quæ earum futura forent, si ejus juri subjectæ non essent, *veneant*. Sed cum recissa *capitis deminutione* imperio continenti *judicio*. (f)

[Desunt 24 lin.]

80. Such is the law in regard to those persons who are under the *potestas*, if a suit arise out of a contract or from the delict of such persons. With reference to those persons who are *in manu* or *in mancipio*, the law thus speaks,—that in the case of an action arising out of their contracts, unless the action be defended *in solidum* by the patron under whose *potestas* they are placed, all property which would have become theirs, if they had not been *alieni juris*, shall be sold; but when by the annulling of the *capitis deminutio*,

(f) In the Codex Ver., of page cxxv^b 24 lines are wanting. Huschke, after the word “judicio,” proposed to read as follows: “agitur, etiam eum ipsa muliere, quæ in manu est, agi potest, quia tam tutoris auctoritas necessaria non est.” He thinks that Gaius had spoken of noxal actions given in consequence of any injury done by vicious animals, and that then he went on to say, “illud omnium noxalium actionum commune esse, quod si servus vel animal ante litis contestationem mortuum sit, noxalis actio extinguitur. Aliud juris esse, si post litis contestationem moriatur.” The remainder of the page he thinks treated of a controversy unknown to us. See Huschke’s Gaius in loco. Also Kritik in loco. pp. 175, 178.

81. *Quamquam* diximus . (g) . . *per-*
missum fuisse . . . mortuos homines
 dedere, tamen et si quis *eum* dederit
 qui fato suo vita excessorit, æque
 liberatur.

81. Although we have said . . that
 it was [not] permitted anyone to sur-
 render dead slaves in a noxal action,
 yet if anyone have surrendered the
 body of one who has died naturally,
 he is likewise freed.

(g) Huschke and Hollweg propose to read “*reo non*” in
 this lacuna.

82. *Nunc admonendi sumus agere*
posse quemlibet aut suo nomine aut
alieno. Alieno, veluti cognitorio,
 procuratorio, tutorio, curatorio: cum
 olim, quo tempore erant legis actiones,
 in usu fuisset alterius nomine agere
 non licere, nisi pro populo et libertatis
 causa. (h)

82. We must now mention that a
 person may conduct an action either
 in his own name or in that of another.
 In the name of another, as for ex-
 ample, a *cognitor*, a *procurator*, a
tutor, or a *curator*; whilst formerly
 at the time of the *legis actiones*, it
 was not permitted to sue in the name
 of another except for the people (*pro*
populo), and for the sake of freedom.

(h) In the Institutes of Justinian we find two other excep-
 tions in addition to those given in the text. By the *lex*
Hostilia an “*actio furti*” might be brought in the name of
 one who was a prisoner in the hands of an enemy, or of
 a person absent in the service of the State or under the care
 of a tutor. Cicero furnishes us with another exception in the
 case of the “*actio repetundarum*,” which a person might
 bring for a stranger. The Orator says, “*Clarissimi viri*
nostræ civitatis, temporibus optimis, hoc sibi amplissimum
pulcherrimumque ducebant, ab hospitibus clientibusque
suis, ab exteris nationibus, quæ in amicitiam populi Romani
ditionemque essent, injurias propulsare, eorumque fortunas
defendere.” Cic. in Q. Cæcilium. 20., see also 16. Instit.
 pr. de iis per quos agere pos. (4. 10.) Domenget in loco.

83. *Cognitor* autem certis verbis
 in litem coram adversario substitui-
 tur. Nam actor ita cognitorem dat:
 QUOD EGO A TE VERBI GRATIA FUNDUM
 PETO, IN EAM REM LUCIUM TITIUM TIBI

83. Now the *cognitor* is substituted
 in the course of the suit by the pro-
 nouncing of certain words in the pre-
 sence of the opposite party. For the
 plaintiff appoints a *cognitor* as follows:

COGNITOREM DO; *adversarius* ita: QUANDOQUE TU A ME EUNDEM PETIS, IN EAM REM PUBLIUM MÆVIUM COGNITOREM DO. Potest, ut actor ita dicat: QUOD EGO TECUM AGERE VOLO, IN EAM REM COGNITOREM DO: *adversarius* ita: QUANDOQUE TU MECUM AGERE VIS, IN EAM REM COGNITOREM DO. Nec interest, *præsens* an *absens* cognitor detur: sed si *absens* datus fuerit, cognitor ita erit, si cognoverit et susceperit officium cognitoris.

"Because I claim from thee," for example, a piece of land, "I appoint in this suit Lucius Titius as *cognitor* against you." The defendant appoints a *cognitor* in the following form: "And since you claim the land from me, I appoint as *cognitor* for the purpose of this suit, Publius Mævius." The plaintiff may also speak thus: "As I desire to sue you, I appoint a *cognitor* for the purpose of the suit;" and the defendant may speak as follows: "Since you wish to sue me, I appoint a *cognitor* for the purpose of the suit." Nor does it make any difference whether the man appointed as a *cognitor* be present or absent: but if anyone be appointed in his absence he will only become *cognitor* when he has received notice, and has undertaken the duties of the office.

84. Procurator vero nullis certis verbis in litem substituitur; sed ex solo mandato, et absente et ignorante adversario, constituitur. Quinetiam sunt qui putant *vel eum* procuratorem videri cui non sit *mandatum*, si modo bona fide accedat ad negotium et caveat ratam rem dominium habiturum. Igitur et si non edat *mandatum* procurator *experiri* potest, quia sæpe *mandatum* initio litis in obscuro est et postea aput iudicem ostenditur. (i)

84. The *procurator* is substituted in the process without any special form of words, but by means of a mere *mandatum*, and he may also be appointed both in the absence and without the knowledge of the opposite side. Moreover, some are of opinion that even he is to be regarded as *procurator* who has received no *mandate*, if only he has undertaken the transactions *bona fide*, and has given security that the decision shall be consented to by his principal. Hence if the *procurator* should not exhibit a *mandatum*, still he may sue; because often at the beginning of a suit the *mandatum* is kept in reserve, but is subsequently produced before the *iudex*.

JUST. iv. 10. 1.

(i) The employment of an Advocate did not change the subject of the suit, as he was simply the organ of the person

for whom he acted. The Procurator, however, occupied quite a different position, as he took the place of the plaintiff or the defendant for whom he might act. The duties imposed upon the Procurator might be more or less extensive. Thus Paulus says, "Procurator aut ad litem, aut ad omne negotium, aut ad partem negotii, aut ad res administrandas datur." Recept. Sent. i. 3. 1.

In the earlier times of Rome there was a difficulty in the admission of a Procurator arising from the mode in which the process was conducted. The solemn words required to be spoken both by plaintiff and defendant rendered such representation next to impossible. Hence, Ulpianus says, "Nemo alieno nomine lege agere potest." l. 123. Dig. de div. reg. jur. antiq. (50. 17.) [Notwithstanding this limitation, we see from Gaius iv. 82, that representation was admissible when the action was brought *pro populo*, or if it were *libertatis causa*. A State or Community could not as such appear *in jure*; hence a procurator was authorised by what we should now denominate a "Power of Attorney" for the purpose of representation. Again, the love of freedom, in the earliest times of the Republic, allowed in the interests of liberty, a procurator to represent a person who could not himself take part in a process on account of his status or condition. We have seen that by a fiction of law, the *heres* might sue as the representative of the *defunctus*: "Id quod defuncti fuit, suum esse, id, quod defuncto debebatur, dari sibi oportere." Gai. iv. 34. Before the right of representation was fully recognised, the need which was sometimes felt for such assistance, was remedied by means of the employment of adstipulatores and adpromissores; namely, sponsores and fidepromissores, who were employed as a succedaneum at the time of the *legis actiones*, and for *legitima judicia*, when *procuratio* was limited or impossible. When representation came to be allowed, adstipulation ceased, except in the case mentioned by Gaius in iii. 117. "Cum ita stipulamur, ut aliquid post mortem nostrum detur." By the *lex Hostilia*,

as we have seen, an exception was made in favour of a person in captivity, or who was absent *rei publica causa*. So also the "actio furti" might be brought for a tutor who was precluded by absence from bringing an action. Similar exceptions also were made for certain actions by the *leges Calpurnia, Junia, and Servilia*. These laws gave for the civil claim a right of action, and the plaintiff might appoint a Roman citizen to sue on his behalf. We have also seen that the law of the Twelve Tables (viii) permitted representation in the case of the "Talion." Cato orig. apud Priscianum vi. p. 710. "Si quis membrum rupit aut os (for *ossum*) fregit talione proximus agnatus ulciscitur." See Dirksen *Zwölf Tafeln* p. 517. Keller's *Civ. Proc.* s. 54. note 642. *Vat. Frag.* s. 324. *Dig.* iii. 3. "De procuratoribus et defensoribus." Puchta's *Instit.* vol. ii. pp. 51. et seq.

85. *Tutores autem et curatores quemadmodum constituantur, primo commentario retulimus.*

85. How *tutors* and *curators* are instituted we have explained in the first commentary. [s. 144. sqq.]

JUST. iv. 10. 2.

86. Qui autem alieno nomine agit, intentionem quidem ex persona domini sumit, condemnationem autem in suam personam convertit. Nam si verbi gratia Lucius Titius pro Publio Mævio agat, ita formula concipitur: SI PARET NUMERIUM NEGIDIUM PUBLIO MÆVIO SESTERTIUM X MILIA DARE OPORTERE, JUDEX NUMERIUM NEGIDIUM LUCIO TITIO SESTERTIUM X MILIA CONDEMNA. SI NON PARET, ABSOLVE. In rem quoque si agat, intendit Publii Mævii rem esse ex jure Quiritium, et condemnationem in suam personam convertit.

86. But whoever sues in the name of another employs in the *intentio* the name of his principal, but changes the *condemnatio* to his own name. If, for example, Lucius Titius sues for Publius Mævius, the formula is thus composed: "If it appears that Numerius Negidius ought to give ten thousand sesterces to Publius Mævius, let the judge condemn Numerius Negidius in the sum of ten thousand sesterces to Lucius Titius. If it does not appear, absolve him." If the *procurator* sue *in rem*, he sets forth in the *intentio* that "the thing belongs to Publius Mævius in Quiritarian ownership," and then changes the *condemnatio* into his own name.

87. Ab adversarii quoque parte si interveniat aliquis, cum quo actio constituitur, intenditur dominum dare oportere; condemnatio autem in ejus personam convertitur qui judicium accepit. Sed cum in rem agitur, nihil *in* intentione facit ejus persona cum quo agitur, sive suo nomine sive alieno aliquis iudicio interveniat; tantum enim intenditur rem actoris esse. (j)

87. Also when anyone appears on the part of the defendant, he by whom the action is brought, sets out the *intentio* as follows, "That the principal ought to give," but the *condemnatio* is against the person who has taken the place of the defendant. But when the action is *in rem*, the name of the defendant is not inserted in the *intentio*, whether he sues for himself or appears before the *judicium* on behalf of another: for in this case the *intentio* only states "that the thing claimed is the property of the plaintiff."

(j) We have already seen, in sec. 84, in what cases and to what extent the principle of representation was permitted in Roman Civil Process. A suitor might be represented either by a procurator or by a cognitor. A procurator in the most extensive signification of the term was one to whom the management of any business was committed. A person might commit his affairs in general to his charge, or commission him for some particular business, "Procurator est, qui aliena negotia mandatu domini administrat. Procurator autem vel omnium rerum vel unius rei esse potest, constitutus vel eorum, vel per nuntium, vel per epistolam. Procurator totorum bonorum." Again, "Procurator cui generaliter libera administratio rerum commissa est." Again, "Cui mandatum est vel specialiter, vel cui omnium negotiorum administratio mandata est." It was also the name applied to the person called to administer a variety of offices under the empire. l. 1. pr. l. 63. 58. Dig. de proc. et defen. (3. 3). But the term was especially used for the person appointed to represent another in an action at law. Hence Ulpianus says, "Eum vero, qui de statu suo litigat, procuratorem habere posse non dubitamus, non solum in administratione rerum, sed etiam *in actionibus* quæ ei vel adversus eum competant, etc." By an imperial rescript, if any one was in danger of being condemned in his absence, a

procurator was admitted to defend him. "Publice utile est, absentes a quibuscunque defendi; nam et in capitalibus judiciis defensio datur. Ubi cumque itaque absens quis damnari potest, ibi quemvis verba pro eo facientem et innocentiam excusantem audiri æquum est, et ordinarium admittere; quod et ex Rescripto Imperatoris nostri apparet." The same jurist has recorded the words of the Prætor. "Ait Prætor: CUJUS NOMINE QUIS ACTIONEM DARI SIBI POSTULABIT IS EUM VIRI BONI ARBITRATU DEFENDAT; ET EI QUO NOMINE AGET, ID RATUM HABERE EUM, AD QUEM EA RES PERTINET, BONI VIRI ARBITRATU SATISDET." 1. 33. secs. 1. 2. 3. Dig. eod. He adds, "Procurator dare ad ulciscendam injuriam, ad agendum, ad defendendum." 1. 8. Dig. eod. The "Procurator in rem suam" was one who, in consequence of a *cessio*, assumed the right of action belonging to another. Hence Paulus says, "Sed si in rem suam datus sit procurator, loco domini habetur, etc." 1. 13. s. 1. Dig. de pact. (2. 14). No form of words was necessary in constituting a procurator, and as may be inferred from the above he might be appointed without the knowledge of the person for whom he was required to act.

The cognitor, on the other hand, as representative of another party in the process, was appointed with formal words. Gai. iv. 83. 97. Paul. Recep. Sent. 1. 2. Asconius says that the cognitor was one. "Qui defendit alterum in judicio—Cognitor est, si præsentis causam novit ac sic tuetur ut suam." Vid. Ernest. in Clav. Cic. The appointment of the cognitor took place in the presence of the litigants, hence "Qui alterius litem, coram ab eo datus, suscipiebat." Festus, lib. iii. Brissonius says, "Cognitor semper, præsentem domino, causam egisse: et ita quidem ex Asconii loco colligere quis posset. Sed rectius, qui ex Festo colligunt, cognitorem semel a præsentem litigatore datum, postea et absentis causam persequi potuisse." Sub voce. In allusion to this, Horace says,

" Ire domum atque

Pelliculam curare jube; si cognitor ipse."—SAT. ii. 5. 36.

Cic. pro Ros. Com. Cap. ii. Gai. ii. 252. iv. 124. The cognitor was said to be substituted "in locum domini," to which the jurists add, "domini loco est," in the sense that the result of the action, whether for or against the cognitor, had the same effect as if the dominus himself had conducted it. See Vat. Frag. secs. 317, 318, 319. From the above remarks it will be seen that the cognitor was a much more formal representative of the litigant party than the procurator, for he was appointed before the magistrate, in the presence of the opposing party, and in solemn words, (*certa quasi sollennia verba*). Not, however, that any technical expressions were required to be used, for, as may be seen in the extracts referred to in the Vaticana Fragmenta, the appointment might be made in the Greek tongue. See Puchta's Instit. vol. ii. p. 55. et seq. Domenget Gai. iv. s. 84. Hermann's Hand-lexicon sub vocib. "Cognitor" and "Procurator."

88. Videamus nunc quibus ex causis is cum quo agitur vel hic qui agit cogatur satisfacere.

88. We will now see in what cases the defendant or the plaintiff is compelled to give security.

JUST. iv. 11. pr.

89. Igitur si verbi gratia in rem tecum agam, satis mihi dare debes. Aequum enim visum est te ideo quod interea tibi rem, quæ an ad te pertineat dubium est, possidere conceditur, cum satisfactione mihi cavere, ut si victus sis, nec rem ipsam restituas nec litis æstimationem sufferas, sit mihi potestas aut tecum agendi aut cum sponsoribus tuis.

89. Thus if, for example, I proceed against you by an action in *rem*, you ought to give me security. For since during the interval of the suit, the possession of the thing, of which the ownership is disputed between us, is awarded to you, it appears equitable that you should furnish security to me; so that if you lose the suit and cannot restore the thing itself, nor pay the amount of damages awarded, I may have the power of proceeding either against you, or against your sureties.

90. Multoque magis debes satisfacere mihi, si alieno nomine iudicium accipias.

90. So much the more ought you to give security to me, if you undertake the suit in the name of another.

91. Ceterum cum in rem actio duplex sit (aut enim per formulam petitoriam agitur aut per sponsionem): si quidem per formulam petitoriam agitur, illa stipulatio locum habet quæ appellatur *judicatum solvi*: si vero per sponsionem, illa quæ appellatur *pro præde litis et vindiciarum*.

91. Moreover, since the *actio in rem* may be *duplex*, (for a man may sue either by means of the *formula petitoria*, or *per sponsionem*,) if the process is by means of the *formula petitoria*, that stipulation is used which is called *judicatum solvi*, but if the process is *per sponsionem* that stipulation is adopted which is called *pro præde litis et vindiciarum*.

JUST. IV. 11. pr.

92. Petitoria autem formula hæc est qua actor intendit rem suam esse.

92. The *formula petitoria* is that in which the plaintiff claims in the *intentio* the thing as his own.

93. Per sponsionem vero hoc modo agimus. Provocamus adversarium tali sponsione: SI HOMO QUO DE AGITUR JURE QUIRITUM MEUS EST, SESTERTIOS CXXV NUMMOS DARE SPONDES? deinde formulam edimus qua intendimus sponsionis summam nobis dare oportere. Qua formula ita demum vincimus, si probaverimus rem nostram esse. (k)

93. But in the process *per sponsionem*, we proceed in the following manner. We challenge our opponent by the *sponsio*: "Do you promise if the slave, which is the object of our suit, is mine by *Quiritarian* ownership, to give me one hundred and twenty-five sesterces?" Then we exhibit the formula by which we claim that the sum mentioned in the *sponsio* ought to be paid to us. We are only successful with this formula, when we have proved that the thing is our property.

(k) The stipulations here referred to were legal transactions in the form of question and answer, whereby one person bound himself to another unconditionally or conditionally, as the case might be. They arose usually from the consent of the parties themselves, and consequently when the person bound by the stipulation failed in his engagement, a foundation was laid for an action. Such stipulations were called "*stipulationes conventionales*." Sometimes, also, the *judex* might impose such stipulations, in which case they were called "*stipulationes judiciales*."

The Prætor also would often enjoin similar stipulations, in which case they were called "*stipulationes Prætoriæ*." In the latter case, by virtue of his order, the litigants were placed under a legal obligation. It is in reference to this mode of creating an obligation that Gaius is here speaking. Those stipulations which referred to the creation of the process were called "*sponsiones*," and they were effected by means of the formal words "*Spondes*" "*Spondeo*." It was obviously only when the litigants were Roman citizens that these formal words could be employed and an obligation originated by their use.

The process, we have said, might be introduced by a *sponsio* imposed upon the parties by the Prætor. The disputed claim was made the object of the stipulation and the rights of the plaintiff, or the matters of fact connected therewith, were the condition of the promise, so far as the defendant was concerned. Plantus says, "*Conditiones tetuli tortas confragasas—uti sponsio fierit*." Menechm. iv. 2. 24. The defendant bound himself conditionally, if the assertion of the plaintiff should be found to be true. For example, "*Si ex edicto P. Burrieni prætoris bona P. Quintii dies xxx possessa non sint*." Cic. pro Quint. 27. Again, "*Si bonorum Turpilie possessionem Q. Cæpio prætor ex edicto suo mihi dederit*." Cic. Fam. vii. 21. Thus the plaintiff by virtue of the *sponsio* was able to proceed by the *condictio*, asserting that the defendant was indebted to him for the amount promised, or in other words, that the condition of the *sponsio*, which implied his right, existed. In this way the process was introduced, and the judge was instructed to decide whether the defendant was liable for the amount promised or not. This mode of procedure stood in close connection with the "*actio sacramento*." When the *sponsio* was thus employed to introduce the process, it was termed "*Sponsio præjudicialis*." When this was the only object for which the *sponsio* was given, the defendant had not to pay the "*Sponsionis summa*," to which he might be condemned. It was a mere processual form, in which the defendant pro-

mised the plaintiff only for the purpose of deciding the suit. But this might also be so managed that an actual stipulation was made binding upon both the litigants, in which case, as we have already stated, there was required a "restipulatio" on the part of the plaintiff. When this took place the sponsio was called a "Sponsio pœnalis."

Gaius gives an example of a pure "Sponsio præjudicialis" in the "in rem actio;" this might be effected by a "formula petitoria," with the "Intentio rem (*corporalem* or *incorporalem*) actoris esse," and was said to be *arbitria*, in which case the defendant was bound "satisfactio judicatum solvi." Or the pure "Sponsio præjudicialis" might be, as it was expressed, "per sponsionem," in which the plaintiff challenged the defendant with the stipulation as in the text. "Si homo quo de agitur ex jure Quiritium meus est, sestertios cxxv nummos dare spondes?" In this case, the formula was given with the Intentio as follows: "Si paret Numerius Negidius Aulo Agerio, etc., cxxv nummos dare oportere;" whilst the defendant was bound for the proceeds and fruits of the thing by the "Stipulatio pro præde litis et vindictiarum." This process also was modelled upon the "legis actio sacramento." Puchta's Instit. vol. ii. pp. 149. et seq. Keller's Cic. Proc. pp. 237. 229.

94. Non tamen hæc summa sponsionis exigitur: nec enim pœnalis est, sed præjudicialis, et propter hoc solum fit, ut per eam de re judicetur. Unde etiam is cum quo agitur non restipulatur: ideo autem appellata est PRO PRÆDE LITIS VINDICTIARUM stipulatio, quia in locum prædium successit; quia olim, cum lege agebatur, pro lite et vindictiis, id est pro re et fructibus, a possessore petitori dabantur prædes.

94. Yet this sum mentioned in the sponsio is not exacted; for it is not a penal action, but præjudicial, and hence is only inserted that a judge may be appointed to investigate the matter. For this reason also there is no restipulation on the part of the defendant. The stipulation *pro præde litis vindictiarum* is so called because it takes the place of the security, which was formerly given at the time of the *legis actio* "*pro lite et vindictiis*," that is, security was given to the plaintiff by the possessor for the thing and its fruits.

95. Ceterum si aput centumviros agitur, summam sponsionis non per formulam petimus, sed per legis actionem: sacramento enim *rem* provocamus; eaque sponsio sesteriorum cxxv nummorum fit, scilicet propter legem

95. Moreover if we proceed before the *centumviri* we do not claim the amount of the sponsio by the formula, but by the *legis actio*, for we summon the defendant by the *sacramentum*; and this sponsio is generally fixed at a hundred and twenty sesterces, by virtue of the lex

96. Ipse autem qui in rem agit, si suo nomine agit, satis non dat.

96. A plaintiff who sues *in rem*, if he sues in his own name, does not give security.

JUST. iv. 11. pr.

97. Ac nec si per cognitorem quidem agatur, ulla satisfactio vel ab ipso vel a domino desideratur. Cum enim certis et quasi sollemnibus verbis in locum domini substituatur cognitor, merito domini loco habetur.

97. If the action is prosecuted by means of a *cognitor*, bail is neither required from him nor from his principal. For when a *cognitor* is substituted for his principal, in a special and as it were a solemn form of words, he is with propriety regarded as fully representing his principal.

98. Procurator vero si agat, satisfacere jubetur ratam rem dominum habiturum: periculum enim est, ne iterum dominus de eadem re experiatur. Quod periculum non intervenit, si per cognitorem actum fuit; quia de qua re quisque per cognitorem egerit, de ea non magis amplius actionem habet quam si ipse egerit.

98. But if a *procurator* commence an action he is ordered to give bail that his principal will subsequently approve the acts done in his name: for there is danger lest the principal should again bring an action for the same thing. This danger could not arise if the action were brought by a *cognitor*, since he who sues by means of a *cognitor* cannot have another action for the same thing, any more than if he had sued in his own name.

JUST. iv. 11. pr.

99. Tutores et curatores eo modo quo et procuratores satisfacere debere verba edicti faciunt. Sed aliquando illis satisfactio remittitur. (l)

99. The words of the edict bind tutors and curators to give security in the same manner as procurators. But sometimes it was dispensed with in their case.

(l) To sum up what Gaius says, we see that in a real action the plaintiff who sued for himself was not required to give security. Nor was the cognitor, who was considered as merely substituted for his *mandans*. The procurator, on the other hand, was bound to give security *de rato* binding his principal subsequently to accept his acts. Tutors and curators were, so far as security was concerned, in the same condition as procurators, though, as we learn from the text, security at times was dispensed with in their case. In the next section we see that the rules in the case of personal actions were the same as those applicable in the case of real actions, so far as the plaintiff was concerned. In a real action the security given by the defendant who was in possession was called *judicatum solvi*, as the plaintiff stipulated that what was adjudged to him should be paid. Instit. pr. de satisdat. (4. 11.) One of the titles in the Digest has for its rubric, “JUDICATUM SOLVI,” and in this title we learn from Ulpianus that there were three objects secured by the bail thus denominated—“Judicatum solvi stipulatio tres clausulas in unum collatas habet: de re judicata, de re defendenda, de dolo malo.” l. 6. Dig. jud. sol. (46. 7.) Thus the litigant party was bound to pay the damages decreed by the sentence; to appear before the judge to receive sentence; and to act in the matter without fraud (*sine dolo malo*). This strictness was modified by Justinian, who required only the promise or oath of the party (*cautio juratoria*), or a mere promise: “vel nudam promissionem vel satisfactionem pro qualitate personæ suæ dare compellitur.” Instit. s. 2. jud. sol. (4. 11.) The rule which prevailed in the case of “*virii illustres*” will be found in l. 17. Cod. de dignit. (12. 1.)

100. Hæc ita si in rem agatur: si vero in personam, ab actoris quidem parte quando satisfacere debeat querentes, eadem repetemus quæ diximus in actione qua in rem agitur.

100. These were the rules in actions *in rem*; but if anyone enquire when the plaintiff is bound to give security in actions *in personam*, we should repeat the same things we have said with regard to actions *in rem*.

101. Ab ejus vero parte cum quo agitur, si quidem alieno nomine aliquis interveniat, omnimodo satisfdari debet, quia nemo alienæ rei sine satisfactione defensor idoneus intellegitur. Sed si quidem cum cognitore agatur, dominus satisfacere jubetur; si vero cum procuratore, ipse procurator. Idem et de tutore et de curatore juris est.

102. Quod si proprio nomine aliquis judicium accipiat in personam, certis ex causis satisfacere solet, quas ipse Prætor significat. Quarum satisfactionum duplex causa est. Nam aut propter genus actionis satisfacitur, aut propter personam, quia suspecta sit. Propter genus actionis, velut judicati deensive, aut eum de moribus mulieris agatur: propter personam, velut si cum eo agitur qui decoxerit, cujusve bona a creditoribus possessa proscriptæ sunt, sive cum eo herede agatur quem Prætor suspectum æstimaverit.

103. Omnia autem judicia aut legitimo jure consistunt aut imperio continentur. (m)

101. On the part of the defendant, if he appeared in the name of another, he was certainly obliged to give security, because no one was regarded as a competent defendant in another's cause unless he gave security. But if the defendant be represented by a cognitor, the principal ought to give security; if however by a procurator, the procurator himself must give security. The same rule of law applies both in respect to tutors and curators.

102. But if any one defends an action *in personam* in his own name, he is accustomed to give security on certain grounds, which are indicated by the Prætor. There are two causes which give rise to this security. For security is required either on account of the nature of the action, or because a person is suspected. On account of the nature of the action, as for example, in the *actio judicati deensive* or *de moribus mulieris*; on account of the person, as for example, if the suit be against a person who has been bankrupt (*qui decoxerit*), or against one whose property has been taken by his creditors and publicly confiscated, or if the action be against an heir whom the Prætor has regarded as suspected.

103. All suits at law are either by the prescription of the civil law (*legitimo jure*), or rest on the *imperium* of the magistrate.

(m) We are indebted to Gaius for the distinction between "judicia legitima" and "judiciæ quæ imperio continentur." In *judicia* of the first kind, only six months was allowed by the "lex Julia judiciaria" from the date of the delivery of

the *formula* or the *litis contestatio* within which the parties could obtain the sentence of the judge. In *judicia* of the second kind the sentence might be given any time during the continuance of the magistrate's year of office. Thus such *judicia* were said to be limited to an *annus litium*. Juvenal has employed this phrase in Satire xvi. contrasting it with the privileges of the military. See *Etudes sur les Classiques Latins* par M. Benech, p. 256.

104. Legitima sunt judicia quæ in urbe Roma vel intra primum urbis Romæ miliarum inter omnes cives Romanos sub uno iudice accipiuntur: eaque e lege Julia judiciaria, nisi in anno et sex mensibus judicata fuerint, expirant. Et hoc est quod vulgo dicitur, e lege Julia litem anno et sex mensibus mori.

104. The *legitima judicia* are those which are obtained in the city of Rome, or within a thousand paces of the city of Rome (*miliarum*), between Roman citizens before a single judge: and these were abolished in accordance with the *lex Julia judiciaria*, if they were not decided by the judge within one year and six months. This also is what is commonly said, that by the *lex Julia* the process is at an end in a year and six months.

105. Imperio vero continentur recuperatoria et quæ sub uno iudice accipiuntur interveniente peregrini persona judicis aut litigatoris. In eadem causa sunt quæcumque extra primum urbis Romæ miliarium tam inter cives Romanos quam inter peregrinos accipiuntur. Ideo autem imperio contineri judicia dicuntur, quia tamdiu valent, quamdiu is qui ea præcepit imperium habebit.

105. But the actions decided by the *recuperatores* rest on the *imperium* of the magistrate, as also do those before a single judge, in which either the judge or one of the litigants is a *peregrinus*. Of the same kind are all those actions which are decided beyond the first milestone (*miliarum*) of the city of Rome, both between Roman citizens, and also between *peregrini*. These *judicia* are said to be *in imperio*, because resting on the *imperium* (of a magistrate) they continue operative, so long as the Prætor who has ordained them shall retain his *imperium*.

106. Et siquidem imperio continenti iudicio actum fuerit, sive in rem sive in personam, sive ea formula

106. And if indeed an action included in the *imperium* has been prosecuted, whether it be real (*in*

quæ in factum concepta est sive ea quæ in jus habet intensionem, postea nihilominus ipso jure de eadem re agi potest. Et ideo necessaria est exceptio rei judicatæ vel in judicium deductæ.

107. At vero *si legitimo judicio in personam actum sit ea formula quæ juris civilis habet intensionem, postea ipso jure de eadem re agi non potest, et ob id exceptio supervacua est. Si vero vel in rem vel in factum actum fuerit, ipso jure nihilominus postea agi potest, et ob id exceptio necessaria est rei judicatæ vel in judicium deductæ. (n)*

rem) or personal (in personam), whether the formula be conceived in factum, or whether it be one that has a legal intentio, a suit can nevertheless be subsequently instituted ipso jure on account of the same thing; and therefore the exceptio rei judicati or in judicium deductæ is necessary.

107. On the contrary, if a person has proceeded in a *legitimum judicium in personam* with that formula, which has an *intentio* framed according to the *jus civile*, he cannot afterwards sue *ipso jure* for the same thing, and hence the *exceptio* is superfluous; but if he has proceeded either *in rem* or *in factum*, he can nevertheless subsequently proceed in another action *ipso jure*, and on account of that, in such a case the *exceptio rei judicatæ* or *in judicium deductæ* is necessary.

(n) We shall hereafter explain the nature of *Exceptiones* or *Pleas*. The "*exceptio rei judicatæ*," as the term denotes, implied that the controversy had been before the *judex*, and had received his decision. Similar remarks may be made in regard to the "*exceptio in judicium deductæ*." The *Exceptio*, as a pleading, negatived the plaintiff's demand. The plea of "*res judicata*" was said to be *peremptory*, and it was a complete and, as the rule, a perpetual answer to the plaintiff's demand. There was, in such cases, what the jurists call a consumption of the Right of Action. This important result followed *ipso jure*, as we see by the next section in the case of the "*legis actiones*," and also in all other cases in the procedure by the Formula in a "*legitimum judicium in personam*," with a formula "*in jus concepta*." Thus, in all actions *in rem* and *in factum*, the defendant could employ against the plaintiff who endeavoured to bring the same action a second time, the "*exceptio rei in*

judicium deductæ," and if the judgment had been actually pronounced, the plaintiff might be met by the "exceptio rei judicatæ." The effect, however, of the "in integrum restitutio," was to place the plaintiff in the same position as if the matter had not been brought into judicium. See Puchta's *Instit.* vol. ii. pp. 181, 182.

108. *Alia causa fuit olim legis actionum.* Nam qua de re actum semel erat, de ea postea ipso jure agi non poterat: nec omnino ita, ut nunc, usus erat illis temporibus exceptionum.

108. It was otherwise formerly with the *legis actiones*. For if a suit had once taken place concerning a thing, a second suit could not be subsequently instituted, on account of that same thing. Nor were *exceptiones* in use in those times as they are now.

109. *Ceterum potest ex lege quidem esse judicium, sed legitimum non esse; et contra ex lege non esse, sed legitimum esse.* Nam si verbi gratia ex lege Aquilia vel Ovinia (o) vel Furia in provinciis agatur, imperio continetur judicium: idemque juris est et si Romæ aput recuperatores agamus, vel aput unum judicem interveniente peregrini persona. Et ex diverso si ex ea causa, ex qua nobis edicto Prætoris datur actio, Romæ sub uno judice inter omnes cives Romanos accipiatur judicium, legitimum est.

109. Moreover, a *judicium* may take place on the ground of a *lex*, and yet not be *legitimum*, and on the other hand not take place on the ground of *lex*, and yet be *legitimum*: for if for example a suit be prosecuted in the provinces on the ground of the *lex Aquila* or *Ovinia*, or *Furia*, the *judicium* will rest on the *imperium*; the same rule of law prevails if a person sues at Rome before the *recuperatores*, or before a single *judex*, when one of the suitors is a peregrinus; and on the other hand if on the ground of a Prætorian action, the suit is prosecuted at Rome before a single *judex* and between Roman citizens only, it is *legitimum*.

(o) This is the reading of the MS. and it is properly retained in the text. Dirksen has proposed to read "Atinia," which Boecking approves: he says "Conj. et mihi quoque placet," and adds, "leges Atinias Furias, etiam Cic. in Verr. ii. l. 42. s. 109. conjunxit; sed Furiam testamentariam ibi voluit, non eam, quam hoc loco Gaius indicasse videtur, de

sponsu." Gai. ii. 225. iii. 121. Boecking in loco. It has been proposed to read Ollinius, but Lachmann observes: "Incognitum est nomen Ollinius. Itaque legendum Ovinia. Neque offendere nos debet majuscula U in media verbi parte posita; nam hujusmodi scripturam a librarii nostri more non abhorrere exempla docent hæc." Gai. in loco.

110. Quo loco admonendi sumus, eas quidem actiones quæ ex lege senatusve consultis proficiscuntur, perpetuo solere Prætorem accommodare: eas vero quæ ex propria ipsius jurisdictione pendent, plerumque intra annum dare.

110. Here we must mention that the Prætor usually grants those actions which arise from a *lex* or a *senatus-consultum* without any limit of time (*perpetuo*), but those on the other hand which depend upon his own jurisdiction, he gives for the most part, within the year.

JUST. iv. 12. pr.

111. Aliquando tamen *ipse quoque Prætor in actionibus imitatur jus legitimum*: quales sunt eæ quas Prætor bonorum possessoribus ceterisque qui heredis loco sunt accommodat. Furti quoque manifesti actio, quamvis ex ipsius Prætoris jurisdictione proficiscatur, perpetuo datur; et merito, cum pro capitali pœna pecuniaria constituta sit.

111. Sometimes, however, the Prætor in actions granted by him imitates the *jus legitimum*: such actions are those which the Prætor adapts to the *possessores bonorum* and to those persons who are *in loco heredis*. Also the action for *furtum manifestum*, although it commences under the jurisdiction of the Prætor, is given *in perpetuo*; and rightly so, since a fine is substituted for capital punishment.

JUST. iv. 12. pr.

112. Non omnes actiones quæ in aliquem aut ipso jure competunt aut a Prætore dantur, etiam in heredem æque competunt aut dari solent. Est enim certissima juris regula, ex maleficiis pœnales actiones in heredem nec competere nec Prætorem dare, (p) velut furti, vi bonorum raptorum, injuriarum, damni injuriæ: sed heredibus actoris hujusmodi actiones competunt nec denegantur, excepta injuriarum actione, et si qua alia similis inveniatur actio.

112. Not all actions which are available against anyone by the civil law itself, or which are given by the Prætor, are equally available or usually given against an heir; for it is a clearly settled rule of law that penal actions on account of delicts, do not avail against the heir, nor are they given by the Prætor. Such, for example, are the actions of theft (*furti*), of property taken with violence (*vi bonorum raptorum*), of injuries (*injuriarum*), of wrongful damage (*damni injuriæ*). But ac.

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JUST. iv. 12. 1.

tions of this nature are available for the heirs of the plaintiff, and are never refused by the Prætor, with the exception of the action for injuries (*injuriarum*), and any other action that may be found to resemble it.

(p) *Nec Prætorem dare*. Gneist has adopted this reading from the conjecture of Rudorff. Goeschen proposed to read *nec dari solere*. The parallel passage in the Institutes reads, "In heredem rei non competere, veluti furti, etc."

113. Aliquando tamen *etiam* ex contractu actio neque heredi neque in heredem competit. Nam adstipulatoris heres non habet actionem, et sponsoris et fidepromissoris heres non tenetur.

JUST. iv. 12. 1.

113. Sometimes however, even an action arising from contract is neither available for the heir nor against him. For the heir of an *adstipulator* has no right of action, and the heir of a *sponsor* and of a *fide-promissor* is not bound.

114. Superest ut dispiciamus, si ante rem judicatam is quo agitur post acceptum judicium satisfaciat actori, quid officio judicis conveniat: utrum absolvere, an ideo potius damnare, quia judicii accipiendi tempore in ea causa fuit, ut damnari debeat. Nostri præceptores absolvere eum debere existimante nec interest cujus generis fuerit judicium. Et hoc est quod vulgo dicitur Sabino et Cassio placere omnia judicia esse absolutoria. De bonæ fidei judiciis autem idem sentiunt diversæ scholæ auctores, quod in his quidem judiciis liberum est officium judicis. Tantumdem *etiam* de in rem actionibus putant, (q)

[Desunt 17 lin.]

114. It remains that we should enquire, what is the duty of the judge when the defendant, after having submitted to the court, satisfies the plaintiff before the decision in the suit has been pronounced: whether he ought to absolve, or rather on this account to condemn, because at the moment when the judicium was submitted to, the defendant was in such a position that he ought to be condemned. The doctors of our school think the judge ought to absolve him; and that it does not matter what may be the nature of the *judicium*. This is what is commonly said that Sabinus and Cassius are of opinion that all judgments are in the nature of acquittals, (*absolutoria*). With respect to actions *bonæ fidei* the writers of the opposite school hold the same opinion, because indeed in such actions the function of the judge is not limited. So far also they think with respect to actions *in rem*

(q) In page lxxxiii^a of the MS. from line 6 to line 22 only a few words can be with certainty deciphered. Gaius says, “ut ante acceptum quidem iudicium restituta re evanescat, post acceptum vero iudicium nihilominus pœna duret; sed tamen absolvendus est etiam, qui post acceptum iudicium restituere paratus est. l. 5. pr. Dig. de public (39. 4). Compare for the rule itself Gai. iii. 180. iv. 106. Also l. 73. Dig. de proc. (3. 3.); l. 23. l. 35. Dig. de judic. (5. 1.); l. 27. s. 1. Dig. de rei vind. (6. 1.); l. 3. s. 2. Dig. commod. (13. 6.); l. 17. Dig. mand. (17. 1.) l. 37. s. 6. Dig. de operis libert. (38. 1.)

115. Sequitur ut de exceptionibus
dispiciamus. (r)

115. In following our plan we will
now treat of exceptions.

(r) We have already briefly referred to this subject in the note to section 107. We will now endeavour to explain this part of Roman civil procedure a little more fully. An exception was originally a means of defence granted by the Prætor, upon principles of equity (*ex æquitate*) against an action given *ex jure civili*. Originally such pleas were inserted in the *formula judicii* in each single case, and the effect was not to destroy the civil action *ipso jure*, but to render it ineffectual *per exceptionem*, or as it was said, *ope exceptionis*. These exceptions, originating in the Prætorian edict, were greatly extended in later times by the introduction of *leges* and *senatus-consulta*, hence the leading division to be first noticed, which inverts the order of their introduction, is the following.

1. *Exceptiones* were divided according to the legal sources from whence they sprang, and were said to be either *civiles* or *prætorix sive honorariæ*, as some were provided for by civil enactment, others were made available by the permission and order of the Prætor. Thus the “*exceptio legis Cincix*,” the “*exceptio Senatus-consulti Macedoniani*,” the “*exceptio Senatus-consulti Velleiani*,” the

“*exceptio Senatus-consulti Trebelliani*,” and others of the same nature, were *exceptiones civiles*. Sometimes when the *jus civile* gave an action, to which the defendant could have no direct answer, the Prætor, by virtue of his jurisdiction, gave an exception to relieve from the penalty or to dissolve the obligation. This was a most important function exercised by this great officer of justice. Thus Heineccius says, “*Erant exceptiones duorum generum. Aliæ ex lege proficiscebantur; aliæ ex edicto Prætoris, quarum illæ CIVILES, hæ PRÆTORIÆ vocantur.*” And then this able jurist concisely adds, “*Sæpe enim, ubi lex dederat actionem, Prætor dabat exceptionem. Sic quum pactum ex Romani juris principiis nihil operaretur: exceptionem tamen pacti admittebat Prætor adeoque hæc Prætoria erat exceptio.*” *Antiq. Rom. lib. iv. 13. 1.* When the Prætor thus interfered he was said to do so *jure prætorio*, a phrase which came to be equivalent to *per exceptionem*. Thus Ulpianus says, “*Si quis autem constituerit, quod jure civili debebat, jure prætorio non debebat, id est, per exceptionem, an constituendo teneatur, quæritur.*” *l. 3. s. 1. Dig. de pec. cons. (13. 5.)* We need only turn to the Digest to see the numerous pleas granted by the Prætor, such, for example, as “*exceptiones doli*,” or “*quod metus causa*,” or “*pacti de non petendo*,” and a great many others. See note to *iv. 30. pp. 641—645.*

2. *Exceptiones* were also said to be either *in jus conceptæ* or *in factum conceptæ*, the former originating in the prescription of enactments, which gave validity to the matter of fact upon which the *exceptio* reposed; the latter having their origin simply in the matter of fact itself. Of the former kind may be mentioned as an illustration, the “*exceptio legis Cincię*.” Thus in a passage of Paulus, we find the “*exceptio in factum*” contrasted with that which arose out of the Cincian law. He says, “*Quoniam neque Cincię legis exceptio obstat, neque in factum.*” *Vat. Frag. 310.* The most common *exceptio in factum* was the *exceptio doli*, in which it was alleged that the plaintiff by the

bringing of his action had made himself liable in fraud (*dolus*). In the former kind of plea, the Prætor instructed the judge to ascertain whether the legal right existed; in the latter he ordered him to investigate the matter of fact alleged by the defendant. See l. 1. s. 16. Dig. de flum. ne quid in flum. (43. 12).

3. Another division of pleas was that derived from the mode, or the *Stellung*, as the Germans term it, in which they were rendered available. Hence they were named *exceptiones directæ* or *vulgares* on the one hand, and *exceptiones utiles* on the other. This division followed, we can at once see, an important division of actions, and proceeding upon the maxim that, "Agere etiam is videtur, qui exceptione utitur, nam reus in exceptione actor est," the defendant *per exceptionem* was able to avail himself as a kind of *quasi actor* of a procedure which properly and originally belonged to the plaintiff. l. 1. Dig. de excep. etc. (44. 1).

4. Another and most important division of pleas, was that some were *peremptoriæ* or *perpetuæ*, and others were *dilatoriæ* or *temporales*. Thus our author in his "Liber primus ad Edictum provinciale," says, "Exceptiones aut perpetuæ et peremptoriæ sunt, aut temporales et dilatoriæ. Perpetuæ atque peremptoriæ sunt, quæ semper locum habent, nec evitari possunt, qualis est doli mali, et rei judicatæ, et si quid contra Leges Senatusve consultum factum esse dicetur, item pacti conventi perpetui, id est, ne omnino pecunia petatur. Temporales atque dilatoriæ sunt, quæ non semper locum habent, sed evitari possunt, qualis est pacti conventi temporalis, id est, ne forte intra quinquennium ageretur. Procuratoriæ quoque exceptiones dilatoriæ sunt, quæ evitari possunt." l. 3. Dig. de excep. præ. et præj. (44. 1). The effect of the peremptory plea, was always to negative the action. Such was the case, as Gaius intimates, with the "exceptio doli mali," the "exceptio rei judicatæ," the "exceptio ex lege Cincia," and others of a like nature. Cicero de Invent. ii. 20. Instit. (4. 13.) and the commentary of Theophilus thereon. The "exceptiones dilatoriæ," or "temporales,"

enabled the defendant to defeat or to avoid the action, without actually destroying it. As examples of the latter kind of plea may be mentioned the “*exceptiones de non petendo intra tempus, litis dividuæ, rei residuæ, cognitoriæ, procuratoriæ, prejudicii*,” and others. When it was objected that the person appointed to represent another, was disqualified by law, or by some other reason, and when proceedings had not been finally determined or concluded *in jure*, the *exceptio cognitoria* or *procuratoria* might be pleaded. Such pleas did not necessarily involve the personal unfitness of the representative appointed by the plaintiff, but might imply other grounds of unfitness, as for instance that he was disqualified by some enactment, or that the representative had not been duly authorised. Ulpianus says, “*Sane solemus dicere, quasdam exceptiones esse dilatorias, quasdam peremptorias, utputa dilatoria est exceptio, quæ differt actionem, veluti procuratoria exceptio dilatoria est; nam qui dicit, non licere procuratorio nomine agi, non prorsus litem infitiatur, sed personam evitat.*” l. 2. s. 4. de excep., etc. (44. 1.)

5. Another division of Exceptions was that they might be either *in personam* or *in rem*. The former were termed “*exceptiones in personam sive personæ cohærentes*,” and could be pleaded only by the person himself to whom they were granted by law. The “*exceptiones in rem conceptæ sive rei cohærentes*,” as they were connected with the legal relation on which the suit was founded, might be alleged by anyone having an interest in the case, and especially by the heirs and sureties of the principal debtor. Paulus says, “*Exceptiones, quæ personæ cujusque cohærent, non transeunt ad alios, veluti ea, quam socius habet exceptionem, quod facere possit, vel parens patronusve, non competit fidejussori, sic mariti fidejussor post solutum matrimonium datus in solidum dotis nomine condemnatur.*” Then, contrasting them with the other class, he adds, “*Rei autem cohærentes exceptiones etiam fidejussoribus competunt, ut rei judicatæ, doli mali, jurisjurandi, quod metus causa factum est. Igitur et si reus pactus sit in rem, omnimodo competit exceptio*

fidejussori. Intercessionis quoque exceptio, item quod libertatis onerandæ causa petitur, etiam fidejussori competit. Idem dicitur, et si pro filiofamilias contra Senatusconsultum quis fidejusserit, aut pro minore vigintiquinque annis circumscripto; quodsi deceptus sit in re, tunc nec ipse ante habet auxilium, quam restitutus fuerit, nec fidejussori danda est exceptio." l. 7. Dig. de excep., etc. (44. 1.) Thus it is clear that the "exceptio in personam" could only be pleaded against the plaintiff who was named in the process. As the "exceptio doli," for instance, could only be aimed at the person chargeable with the fraud. The "exceptio in rem," on the other hand, might be set up against any plaintiff whatever. Generally the Exceptio was *in rem*, and such a pleading pointed to the fact that the transaction was illegal *ab initio*, as, for example, in the case of *vi, metus*, etc. The peculiarity of such an Exceptio was that it might be brought not only against the plaintiff himself, but also against his representative or heirs. Thus the "exceptiones re coherentes" might be brought by the defendant against any person standing in the place of the original plaintiff. l. 4. ss. 27, 31, 33; 2. s. 1. Dig. de doli mali, etc. (44. 4.) l. 3. pr. s. 1. Dig. de excep. rei vend. (21. 3.) l. 24. Dig. de excep., etc. (44. 1.) l. 21. s. 5. ll. 22. 26. de pact. (2. 14.) Instit. de replic. (4. 14.) Savigny's System, vol. v. 229. Keller's Civ. Proc. s. 37. Mackelley, p. 207 et seq. Scheurl. Instit. s. 63. Heumann's Handlexicon sub voce "Exceptio."

116. Comparatæ sunt autem exceptiones defendorum eorum gratia cum quibus agitur: sæpe enim accidit, ut quis jure civile teneatur, sed iniquum sit eum judicio condemnari. Velut si stipulatus sim a te pecuniam tamquam credendi causa numeraturus, nec numeraverim, nam eam pecuniam a te peti posse certum est; dare enim te oportet, cum ex stipulatu teneris: sed quia iniquum est te eo nomine condemnari, placet per

116. Exceptions have been devised for the purpose of defending those against whom an action is brought. For it often happens that a person is bound by the *jus civile*, but it would be inequitable to condemn him in the *judicium*. For if I have made a stipulation with you that I will advance a sum of money by way of loan, and do not pay it, yet it is certain that you can be sued for that sum of money; since you will be held liable

exceptionem doli mali te defendi debere. Item si pactus fuero tecum, ne id quod mihi debeas a te petam, nihilominus id ipsum a te petere possum DARE MIHI OPORTERE, quia obligatio pacto convento non tollitur: sed placet debere petentem per exceptionem pacti conventi repelli.

by the force of the stipulation to repay under the formula (*te dare oportet*), but because it is inequitable that you should be condemned on such a ground, it is held that you ought to be defended by the plea of fraud (*exceptio doli mali*). Again, if I have concluded an agreement with you that I will not demand from you what you are indebted to me, still (according to the *jus civile*) I can sue you for it by the formula *dare mihi oportere*, because the obligation is not destroyed by the agreement we have concluded; but it is held that I should be non-suited in my claim by means of the plea of an accepted agreement (*pacti conventi*).

JUST. iv. 13. 2. 3.

117. In his quoque actionibus quæ non in personam sunt exceptiones locum habent. Velut si metu me coegeris aut dolo induxeris ut tibi rem aliquam mancipio dem; nam si eam rem a me petas, datur mihi exceptio per quam, si metus causa te fecisse vel dolo malo arguero, repelleris. Item si fundum (s) litigiosum sciens a non possidente emeris, eumque a possidente petas, opponitur tibi exceptio, per quam omnimodo summo veris.

117. Also in those actions which are not personal, *exceptiones* are employed. For example, if you have forced me by fear (*metus*), or induced me by fraud (*dolus*), to convey anything to you in mancipation. For if you claim that thing from me, an exception is given to me, by which if I prove that you have caused me to act through fear or from wilful deceit, you will be non-suited. Again if knowing an estate to be the object of a suit at law, you have bought it of one not in possession, and then bring an action for it against the possessor, you are opposed by an *exceptio*, through which you will be non-suited in every case.

(s) *Item si fundum, etc.* "Qui contra edictum divi Augusti rem litigiosam a non possidente comparavit, præterquam (quod) emptio nullius momenti est, pœnam quinquaginta sestertiorum fisco representare compellitur. Res autem litigiosa videtur, de qua apud suum judicem delata est. Sed hoc in provincialibus fundis prava usurpatione

optinuit." *Fragm. de jure fisci. s. 8. l. 1. Dig. de litig. (44. 6.) l. 1. s. 2. Dig. qu. res pig. (20. 3).*

118. *Exceptiones autem alias in edicto Prætor habet propositas, alias causa cognita accommodat. Quæ omnes vel ex legibus vel ex his quæ legis vicem optinent substantiam capiunt, vel ex jurisdictione Prætoris proditæ sunt.*

118. The Prætor has set forth certain *exceptiones* in his edict; he adapts others after investigation of the matter. But all either derive their validity from the laws, or from those legal decisions which attain the force of law, or have proceeded from the jurisdiction of the Prætor.

119. *Omnes autem exceptiones in contrarium concipiuntur, quam adfirmat is cum quo agitur. Nam si verbi gratia reus dolo malo aliquid actorem facere dicat, qui forte pecuniam petit quam non numeravit sic exceptio concipitur: SI IN EA RE NIHIL DOLO MALO AULI AGERII FACTUM SIT NEQUE FIAT. Item si dicatur contra pactionem pecunia peti, ita concipitur exceptio: SI INTER AULUM AGERIUM ET NUMERIUM NEGIDIUM NON CONVENIT NE EA PECUNIA PETERETUR. Et denique in ceteris causis similiter concipi solet. Ideo scilicet quia omnis exceptio objicitur quidem a reo, sed ita formulæ inseritur, ut condicionalem faciat condemnationem, id est, ne aliter judex eum cum quo agitur condemnet, quam si nihil in ea re qua de agitur dolo actoris factum sit; item ne aliter judex eum condemnet, quam si nullum pactum conventum de non petenda pecunia factum erit. (t)*

119. But all exceptions are framed in direct opposition to the allegations of the plaintiff. For if, for example, the defendant asserts that the plaintiff does anything fraudulently, as in claiming a sum of money, which he has not paid, the *exceptio* is thus framed: "If in that thing nothing has been or is now being done fraudulently by Aulus Agerius." Again, if it is alleged that a sum of money is claimed in contravention of an agreement, the *exceptio* is thus framed. "If between Aulus Agerius and Numerius Negidius, an agreement has not been concluded that this sum of money should not be demanded," and so in other cases, it is usual for the *exceptio* to be similarly framed. Thus therefore, because every *exceptio* is an objection raised by the defendant, it is inserted in the formula in such a manner as to render the *condemnatio* conditional, that is, that the judge only condemns the defendant, when nothing in connexion with the matter which is the object of the suit, has been fraudulently done by the plaintiff. Or again, the judge only condemns him when no agreement has been concluded that the money should not be sued for at law.

(t) Exceptions were in their origin the result of the intervention of the Prætor. They were introduced under the system of the formula, with a view to the prevention of an inequitable condemnation through the severe strictness of the actions given by the *jus civile*. After the influence of the Prætor came to be felt in the operation of the *jus honorarium*, and at a later period, further ameliorations were introduced by means of Senatus-consulta, and Imperial constitutions. Cic. de Inv. ii. 12. See p. 723. Domenget in loco, and the authorities there cited.

120. Dicuntur autem exceptiones aut peremptoriæ aut dilatoriæ.

120. Exceptions are either peremptory or dilatory.

121. Peremptoriæ sunt quæ perpetuo valent, nec evitari possunt, velut quod metus causa, aut dolo malo, aut quod contra legem senatusve consultum factum est, aut quod res judicata est vel in judicium deducta est. Item pacti conventi quo pactum est ne omnino pecunia peteretur. (u)

121. Exceptions are peremptory which avail in perpetuity and which the plaintiff cannot set aside, as that on account of fear (*metus causa*) or fraud (*dolus malus*), or because something has been done in violation of a lex or senatus-consultum, or because the matter has been already decided by a *judex*, or is pending before a *judex*. Also the exception "*pacti conventi*" is included, by which it has been agreed that the party would never sue at law for the money.

JUST. iv. 13. 9.

(u) Peremptory pleas could only be opposed to the plaintiff at the time when he brought his suit. Such an exception was said to be *perpetual*, because the right of the person using it was never extinguished. It was different with a dilatory plea, which, as Justinian observes, presented an obstacle for a certain time, or as in some cases of the *exceptio pacti conventi* which only secured delay. Instit. de except. (4. 13).

122. Dilatoriæ sunt exceptiones quæ ad tempus nocent, veluti illius pacti conventi quod factum est verbi gratia ne intra quinquennium peter-

122. Those are dilatory exceptions which are fatal to the plaintiff only within a certain time; as those arising from a *pactum conventum* which, for

etur: finito enim eo tempore non habet locum exceptio. Cui similis exceptio est litis dividuæ et rei residuæ. Nam si quis partem rei petierit et intra ejusdem præturam reliquam partem petat hac exceptione summovetur, quæ appellatur litis dividuæ. Item si is qui cum eodem plures lites habebat, de quibusdam egerit, de quibusdam distulerit, ut ad alios judices eant si intra ejusdem præturam de his quæ ita distulerit agat, per hanc exceptionem quæ appellatur rei residuæ summovetur.

JUST. iv. 13. 10.

123. Observandum est autem ei cui dilatoria objicitur exceptio, ut differat actionem: alioquin si objecta exceptione egerit, rem perdit. Nec enim post illud tempus, quo integra re evitare poterat, adhuc ei potestas agendi superest, re in judicium deducta et per exceptionem precepta.

124. Non solum autem ex tempore, sed etiam ex persona dilatoriæ exceptiones intelleguntur, quales sunt cognitoria; velut si is qui per edictum cognitorem dare non potest per cognitorem agat, vel dandi quidem cognitoris jus habeat, sed eum det cui non licet cognituram suscipere. Nam si objiciatur exceptio cognitoria, si ipse talis erit, ut ei non liceat cognitorem dare, ipse agere potest: si vero cognitori non liceat

example, bound the party not to claim for the space of five years; for after the lapse of that time the *exceptio* can not be pleaded. An exception analogous to that is the exception *litis dividuæ* and *rei residuæ*. For if any one sue for a part of a thing, and within the Prætorship of the same Prætor demands the remainder, he will be nonsuited by this exception which is named the *exceptio litis dividuæ*. Again, if he who has several suits against one and the same party, prosecutes some actions, but postpones others that they may be submitted to other judges, he will be nonsuited by means of the exception *rei residuæ*, if during the Prætorship of the same Prætor he institutes the actions which he has thus postponed.

123. It must be observed that the person to whom a dilatory plea is opposed must be careful to delay the action; otherwise, if notwithstanding the pleading of the exception he continues the suit, he loses his case. For after that time in which, if the matter had remained intact, he could have avoided the exception, he has no right of action remaining, since the cause having been brought into *judicium* is now stopped by the plea *in judicium deductæ*.

124. But dilatory exceptions are not only allowed in relation to time, but also to persons; such are the *exceptiones cognitoria*; as if, for example, anyone who according to the edict cannot appoint a cognitor sues by one, or if indeed having the right to a cognitor, he appoints a person who cannot undertake the office. For if the *exceptio cognitoria* is employed against him, and he himself is one who has no right to

cognituram suscipere, per alium cognitorem aut per semet ipsum liberam habet agendi potestatem, et *potest* tam hoc quam illo modo evitare exceptionem. Quod si dissimulaverit eam et per cognitorem egerit, *rem perdit.* (v)

appoint a cognitor, he can sue on his own behalf; but if the cognitor whom he has named cannot undertake the office, he has free power to sue by another cognitor, or in his own person, and thus either in one way or the other he can avoid the *exceptio*; But if he intentionally disregard this *exceptio* and sue by the first cognitor, he loses the action.

(v) Among the most important exceptions of the Roman Law may be mentioned the following:—the *exceptio quod metus causa*; the *exceptio doli mali*; the *exceptio erroris*; the *exceptio pacti conventi*; the *exceptio juris iurandi*; the *exceptio rei judicatae*; the exceptions for compensation; *procuratoriæ et cognitoriæ*; *rei residuæ*; *litis dividuæ*; *non numeratæ pecuniæ*; the exception given by the *senatus-consulta Trebellianum, Velleianum, and Macedonianum*; also the *exceptio* given by the *lex Cincia*, and the *exceptio iusti dominii*. For an able note on these topics see Domenget in Gai. pp. 589—598.

125. *Sed peremptoria quidem exceptione cum reus per errorem non fuit usus, in integrum restituitur servandæ exceptionis gratia; dilatoria vero si non fuit usus, an in integrum restituatur, quæritur.*

125. When the defendant through error has not made use of a peremptory plea, restitution *in integrum* will be awarded him for the sake of preserving the *exceptio*; but on the other hand, if a dilatory plea has not been made use of, it is a matter of question whether restitution will be made *in integrum*.

126. *Interdum evenit, ut exceptio quæ prima facie justa videatur, inique noceat actori. Quod cum accidat, alia adjectione opus est adjuvandi actoris gratia: quæ adjectio replicatio vocatur, quia per eam replicatur atque resolvitur vis exceptionis. Nam si verbi gratia pactus sim tecum, ne pecuniam quam mihi debes a te peterem, deinde postea in contrarium*

126. Sometimes it happens that an exception which in its first form appears correct, is found to affect the plaintiff inequitably. When this happens, it is necessary, in order to assist the plaintiff, to make another addition. This addition is called a *Replication*, because by means of it the force of the exception is rebutted and resolved. For if, for example, I

pacti sumus, id est ut petere mihi liceat, et si agam tecum, excipias tu, ut ita demum mihi condemneris, si non convenerit ne eam pecuniam peterem, nocet mihi exceptio pacti conventi; namque nihilominus hoc verum manet, etiam si postea in contrarium pacti simus. Sed quia iniquum est me excludi exceptione, replicatio mihi datur ex posteriore pacto hoc modo: "si non postea convenerit ut eam pecuniam petere liceret." Item si argentarius pretium rei quæ in auctionem venierit persequatur, obicitur ei exceptio, "ut ita demum emptor damnetur, si ei res quam emerit tradita esset": quæ est justa exceptio. Sed si in auctione prædictum est, ne ante emptori traderetur res quam si pretium solverit, replicatione tali argentarius adjuvatur: "Aut si prædictum est ne aliter emptori res traderetur quam si pretium emptor solverit." (w)

JUST. IV. 14. pr.

have entered into an agreement with you that I would not demand from you the money that you were owing me, and if we have subsequently concluded an opposite agreement, that is to say, that I should be at liberty to sue you; and if when I bring an action against you, and you take the exception, "that you ought only to be condemned to me if there have been no agreement that I would not demand the money," then the *exceptio pacti conventi* operates injuriously to me. For it nevertheless remains true, even though we have subsequently entered into a contrary agreement. But because it is inequitable that I should be excluded by this plea, a replication is given to me in virtue of the latter agreement in the following manner, "If it has not been subsequently agreed that I should be at liberty to demand the money." Again if a banker, seeking to obtain the price of a thing which has been sold by public auction, is met by the exception "that the purchaser should only be condemned, if the thing which he had bought has been delivered to him," this is a legal plea. But if at the time of the auction the purchaser was forewarned, that the thing would not be delivered to him before he had paid the purchase money, the banker is aided by such a counter plea (*replicatio*) as the following: "Or if it has been announced that the thing would not be delivered to the purchaser except he has paid the purchase money."

(w) The text shows in what way a plea might be used, so as to protect a person who had sold goods, from the person who had bought but not paid for them. Though the seller was bound to deliver, we see that he might stipulate

that the goods would not be delivered to the purchaser before he had paid purchase-money.

127. Interdum autem evenit, ut rursus replicatio quæ prima facie justa sit, inique reo noceat. Quod cum accadat, sit adjectione opus est adjuvandi rei gratia, quæ duplicatio vocatur.

127. Again it sometimes happens that the replication which in its first form appeared to be right, is afterwards found to affect unfairly the defendant. Hence when this happens it is necessary to add something for the sake of assisting the defendant: this addition is called a Duplicatio.

JUST. IV. 14. 1.

128. Et si rursus ea prima facie justa videatur, sed propter aliquam causam inique actori noceat, rursus ea adjectione opus est, qua actor adjuvetur, quæ dicitur triplicatio. (x)

128. And if again this appears in its first form equitable, but for some reason proves to be unfair to the plaintiff, it becomes again necessary to add something by which the plaintiff may be assisted: this addition is called a Triplicatio.

(x) The Replicatio stood in the same relation to the Exceptio that the latter did to the Actio. Its object was to authorise the judge before arriving at his decision to take into consideration certain matters of fact, or points of law, in order to modify or to change his decision from what it would be if he had been simply instructed to decide *ex jure civili*. In technical language, as the Exceptio was a "denegatio actionis," so the Replicatio operated as a "denegatio exceptionis." In this way the pleadings might be continued to the Triplicatio, Quadruplicatio, and so on; each pleading producing its own effect, as a "denegatio" of the one immediately preceding. The pleading might in this way constitute a series of terms in which the object of each term was to cancel the one that immediately preceded it. The Replicatio was a "conditio negativa" of the Exceptio, just as the Exceptio itself was a "conditio negativa" of the Actio. The effect of the double negation was to affirm the declaration contained in the original action, so that if the plaintiff succeeded in his Replicatio, he gained the

suit. The words *aut si* were the normal particles by which these pleadings were introduced. Replications might be either *in jus* or *in factum conceptæ*. It is obvious that such pleadings belonged essentially to the proceedings *per formulas*. The following outline examples will explain how these different pleadings were introduced into the formula. The illustration is that of the *REI VINDICATIO*. "*Annius judex esto. Si paret illam rem qua de agitur ex jure Quiritium Aulæ Ageriæ esse, si non eam rem Aula Ageria Numerio Negidio vendidit ac tradidit, AUT SI EA VENDITIO CONTRA SENATUSCONSULTUM VELLEIANUM FACTA EST, nisi eam rem Numerius Negidius Aulæ Ageriæ arbitrato tuo restituet, quanti ea res erit, Numerium Negidium Aulæ Ageriæ condemna. Si non paret absolve.*" Or: "*Extra quam si ea res Numerio Negidio usufructus nomine tradita est, AUT SI AULO AGERIO USUFRUCTUS NOMINE SATISDATUM NON EST, nisi . . . restituet,*" and so on. Or: "*Extra quam si mandatu Auli Agerii ea res Numerio Negidio vendita ac tradita est, AUT SI AULUS AGERIUS MANDAVIT, NE TRADERETUR ANTEQUAM PRETIUM SOLVERETUR, nisi . . . restituit,*" and so forth. Or with the *Duplicatio*; "*Extra quam si Sempronius curator Titii dementis, cui Aulus Agerius heres factus est, eas res Numerio Negidio vendidit, AUT SI SINE SATISDATIONE SECUNDUM DECRETIUM INTERPOSITA VENDIDIT, NEQUE IN EA RE DOLO MALO AULI AGERII ALIQUID FACTUM EST SIVE FIAT, nisi . . . restituet,*" etc. Or, "*Extra quam si a Sempronia, cui Aulus Agerius heres est, eæ res Numerio Negidio donandi causa traditæ sunt, AUT SI HOC CONTRA LEGEM CINCIAM FACTUM EST, NEQUE IN EA RE DOLO MALO AULI AGERII ALIQUID FACTUM EST, SIVE FIAT, nisi . . . restituet,*" and so forth. See further on this subject, Keller's *Civil Process*, where examples of the "*Actio Publiciani*," the "*Actio de certa credita pecunia*," and the "*Actio negotiorum gestorum*," will be found pp. 146 et seq. l. 32 s. 2. Dig. ad *Senatus-consulta Vell.* (16. 1) Vat. Frag. 259. compare 266.

129. *Quarum omnium adjectionum usum interdum etiam ulterius quam diximus varietas negotiorum introduxit.*

129. The diversity of legal matters has introduced the use of all these additions, which are even sometimes extended beyond what we have mentioned.

JUST. IV. 14. 3.

130. *Videamus etiam de præscriptionibus quæ receptæ sunt pro actore.*

130. But now we will speak of prescriptions which are employed in favour of the plaintiff.

131. *Sæpe enim ex una eademque obligatione aliquid jam præstari oportet, aliquid in futura præstatione est. Velut cum in singulos annos vel menses certam pecuniam stipulati fuerimus: nam finitis quibusdam annis aut mensibus, hujus quidem temporis pecuniam præstari oportet, futurorum autem annorum sane quidem obligatio contracta intellegitur, præstatio vero adhuc nulla est. Si ergo velimus id quidem quod præstari oportet petere et in iudicium deducere, futuram vero obligationis præstationem in incerto relinquere, necesse est ut cum hac præscriptione agamus: "Ea res agatur cujus rei dies fuit." Alioquin si sine hac præscriptione egerimus, ea scilicet formula qua incertum petimus, cujus intentio his verbis concepta est: "Quidquid paret Numerium Negidium Aulo Agerio dare facere oportere," totam obligationem, id est etiam futuram in hoc iudicium deducimus, et quantumvis in obligatione fuerit, tamen id solum consequimur, quod litis contestatæ tempore præstari oportet, ideoque removemur postea agere volentes. Item si verbi gratia ex empto agamus, ut nobis fundus mancipio detur, debemus ita præscribere: "Ea res agatur de fundo mancipando:" ut postea, si velimus vacuum possessionem nobis tradi, de tradenda*

131. For oftentimes from one and the same obligation something ought to be performed at the present time, something in the future. For example, when we have stipulated for a certain sum of money each year or each month; in this case, at the expiration of every year or month, the sum due for this period of time ought to be paid; and moreover the obligation is certainly understood to be binding for future years, but there is no obligation for the present performance thereof. If therefore we wish to claim and to bring before the judge that which ought to be performed, but to leave in uncertainty the future performance of the obligation; it is necessary that we sue with this prescription: "Let the thing, so far as it is now due be the object of the suit." Otherwise if we have bought our action without this prescription and by the aid of that formula by which we claim an uncertain thing—the *intentio* of which is conceived in these words: "That whatever it appears Numerius Negidius ought to give or to do to Aulus Agerius"—we have brought the entire obligation that is to say the future also, into this cause, and whatever may be the amount of this obligation we obtain that only which has become due at the time of the *litis contestatio*, and

ea vel ex stipulatu vel ex empto agere possimus. Num si non præscribimus, totius illius juris obligatio illa incerta actione "Quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet" per litis contestationem consumitur, ut postea nobis agere volentibus de vacua possessione tradenda nulla supersit actio.

when subsequently we wish to sue for the remainder, we are non-suited. Again, if for example we sue on the ground of purchase, that an estate should be given us by mancipation, we ought thus to prescribe: "Let that thing be the object of the suit so far as it concerns the transfer of the land by mancipation." So that if we subsequently wish to have the vacant possession delivered to us, we may be able to sue for its delivery either by stipulation (*ex stipulatu*), or on the ground of purchase, (*ex empto*). For if that prescription is not employed the entire legal obligation sued for by that form of *actio incerta*, "Whatever on account of that thing Numerius Negidius ought to give, or to do to Aulus Agerius," is destroyed in consequence of the issue (*litis contestatio*); so that if we afterwards wish to sue for the delivery of the vacant possession no action remains open to us.

132. *Præscriptiones autem appellatas esse ab eo, quod ante formulas præscribuntur, plus quam manifestum est. (y)*

132. But it is very clearly evident that prescriptions are so named because they were written before the *formule*.

(y) In sections 130—137 Gaius treats of Prescriptions. The attention of the student has been already directed to this topic in treating of the Demonstratio. See pp. 655—657. The present sections will explain the nature of Prescriptions and their relation to other parts of the formula. Certain Prescriptions were introduced in favour of the defendant; but we learn from Gaius that in his time such prescriptions were transformed into exceptions or pleas. In the "*præscriptio hereditatis*," the magistrate inserted in the formula the

clause "*ea res agatur, quod præjudicium hæreditati non fiat.*" The "*præscriptio fori*" was placed at the head of the formula when the defendant took exception to the tribunal. By the "*præscriptio temporis*," as we have already seen, an effort was made to rebut the claim of the plaintiff on the ground that the time for the action had expired. See Domenget, Gai. p. 603.

133. Sed his quidem temporibus, sicut supra quoque *indicavimus*, omnes præscriptiones ab actore proficiuntur. Olim autem quædam et pro reo opponebantur. Qualis illa erat præscriptio: "*Ea res agatur: si in ea re præjudicium hereditati non fiat:*" quæ nunc in speciem exceptionis deducta est, et locum habet cum petitor hereditatis alio *genere* iudicii præjudicium *hereditati* faciat, velut cum *res singulas petat: esset enim iniquum.*

[Desunt 24 lin.]

134 . . . (z) *intentione formulæ determinatur* is cui dari oportet; et sane domine dare oportet quod servus stipulatur. At in præscriptione de pacto quæritur quod secundum naturalem significationem verum esse debet.

133. But at the present time, as we have already observed, all prescriptions proceed from the plaintiff. But formerly some were also pleaded in favour of the defendant. The following prescription was of this kind: "Let that thing be the subject of the action, if in that thing there is no *præjudicium* to the inheritance;" a form of prescription which is now made into a special plea (*exceptio*), and is employed when the claimant by petition (*petitor*) of an inheritance obtains, by another kind of action, a previous decision affecting the inheritance (*præjudicium*); as for example, when he claims particular things, for it would be inequitable

134. By the *intentio* of the formula we determine who it is that is entitled to the obligation, and we ought certainly to give to the owner that for which his slave stipulates. But in the prescription concerning a contract (*de pacto*), enquiry is made as to what ought to be valid according to the natural signification of the agreement.

(z) The close of section 133 and the commencement of 134 are obliterated in the Verona MS. Gneist says, that on the page cxxiib nothing can be deciphered. Having regard however to what follows, and referring to the Digest

[l. 21. Dig. de excep. (44. 1), l. 54. Dig. de judic. (5. 1). l. 40. de R.C. (12. 1). l. 126. s. 2. de V. O. (45. 1),] Heffter proposes to fill up the blank thus, "per unius partis petitionem majori quæstioni de ipsa hereditate præjudicari. Quare etiam his temporibus ei, unde petitur, exceptio hanc in rem comparatur . . . (s. 134) Ab actore autem vel nunc præscriptiones quædam speciales præter eas quas supra enumeravimus adhibenda sunt . . si, verbi gratia, dominus servi alicujus ex stipulatione ejus agere velit, in qua et præsentis et futuræ obligationes ex pacto insunt, forte si ita convenisset, ut ex pecunia quæ in stipulatum deducta est menstrua V. HS. refunderentur: intentioni actoris loco demonstrationis ita præscribendum est: ea res agatur quod Chrysogonus Lucii Seii servus actor de Numerio Negidio tricies HS. stipulatus est convenitque inter eos, ut ex ea pecunia menstrua V. HS. refunderentur cujus rei dies fuit. Deinde intentione" . . . Gneist in loco.

135. Quæcumque autem diximus de servis, eadem de ceteris quoque personis quæ nostro juri subjectæ sunt dicta intellegemus.

135. But whatever we have said of slaves we shall understand as also applicable to those persons who are subject to our power (*jus*).

136. Item admonendi sumus, si cum ipso agamus qui incertum promiserit, ita nobis formulam esse propositam, ut præscriptio inserta sit formulæ loco demonstrationis, hoc modo: "Judex esto. Quod Aulus Agerius de Numerio Negidio incertum stipulatus est modo cujus rei dies fuit quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet," et reliqua.

136. Again, we must mention, if we take legal proceedings against one who has promised us an uncertain thing, the formula is so framed that the *præscriptio* may be inserted in the place of the *demonstratio* of the formula as follows: "Let there be a judge. Because Aulus Agerius has stipulated an uncertain thing of Numerius Negidius (condemn him) only so far as the thing is now due, in whatever on account of that thing Numerius Negidius ought to give, or to do to Aulus Agerius," and so forth.

137. Si cum sponsore aut fidejussore agatur, præscribi solet in persona quidem sponsoris hoc modo: "Ea res agatur. Quod Aulus Agerius de

137. If an action is commenced with a sponsor or fidejussor, the *præscriptio* is usually composed in the case of the sponsor in the follow-

Lucio Titio incertum stipulatus est, quo nomine Numerius Negidius sponsor est, cujus rei dies fuit;” in persona vero fidejussoris: “Ea res agatur quod Numerius Negidius pro Lucio Titio incertum fidei suae esse jussit, cujus rei dies fuit;” deinde formula subicitur.

ing manner: “Let the thing be the subject of an action. Because Aulus Agerius has stipulated an *incertum* with Lucius Titius, for whom Numerius Negidius is sponsor (condemn him), so far as the thing is now due:” but in the case of the fidejussor, the prescription is, “Let that thing be the subject of the action. Because Numerius Negidius has become fidejussor for an *incertum* on behalf of Lucius Titius, (condemn him) so far as the thing is now due,” then the formula immediately follows.

138. Superest ut de interdictis dis-
piciamus. (a)

138. It remains now that we treat
of interdicts.

JUST. iv. 15. pr.

(a) “Interdictum est, quia (al. *quod*) a iudice non in perpetuum, sed pro reformando momento ad tempus interim dicitur, salva propositione actionis ejus.” Isidor. Orig. v. 25. s. 33. The student should also read on the subject of the Interdict, the remarks of Ulpianus and of Paulus in ll. 1 & 2. Dig. de interdic. (43. 1.)

139. Certis igitur ex causis Prætor aut Proconsul principaliter auctoritatem suam finiendis controversiis *interponit*. Quod tum maxime facit, cum de possessione aut quasi possessione inter aliquos contenditur. Et in summa aut jubet aliquid fieri, aut fieri prohibet. Formulæ autem verborum et conceptiones quibus in ea re utitur interdicta *decretave* vocantur.

139. Thus on certain grounds the Prætor or Proconsul interposed his authority in the first place for the purpose of putting an end to disputes. Which intervention occurs most frequently when there is a dispute among persons in relation to possession or *quasi* possession. And in general the Prætor either orders something to be done or prohibits something being done. Now the formulæ and the common forms of words employed for this purpose are named either interdicts (*interdicta*) or decrees (*decreta*).

JUST. iv. 14. pr.

140. *Vocantur autem decreta* cum fieri aliquid jubet, velut cum præcipit, ut aliquid exhibeatur aut resti-

140. They are called decrees when he commands something to be done, as for example, when he ordains

tuatur: interdicta vero cum prohibet fieri, velut cum præcipit: ne sine vitio possidenti vis fiat, neve in loco sacro aliquid fiat. Unde omnia interdicta aut restitutoria aut exhibitiva aut prohibitoria vocantur. (b)

that something shall be produced in court or restored; on the other hand they are termed interdicts, when he forbids the doing of something, as for example, when he prescribes that no violence shall be done to the *bona fida* possessor (*sine vitio possidens*), or something shall be not done in a consecrated place (*in loco sacro*). Whence all interdicts are named either *restitutory*, or *exhibitory* or *prohibitory*.

(b) In directing attention to the important subject of the Interdict, it may be observed that the two previous sections mark an essential distinction between the *Actio* and the Interdict so far as the *Prætor* and the *Proconsul* were concerned. At the time of the “*legis actiones*,” the *Prætor* had the power, in certain given cases, to hear and to determine between litigants without the appointment of a *judex*. The Romans did not limit their magistrates in granting their decisions to the strict law, but allowed them to modify their decrees to a certain extent for the public benefit or for the purpose of doing justice between the suitors. In the age of Cicero, the *Prætor* appears to have issued a conditional decree, and not to have granted an absolute injunction except upon the application of the plaintiff. Again in the edict promulged by the *Prætor*, we find that when referring to the remedy introduced by his authority, the Roman magistrate used a two-fold expression, namely, “*judicium dabo*” or “*actionem dabo*.” By virtue of the latter, he gave either a *formula in factum concepta* or an *actio ficticia*; by means of the former he decreed that the defendant should according to circumstances, either at once terminate his wrongful act; or restore things to their former condition; or produce that which he had abstracted or wrongfully withheld from the plaintiff. This interference of the *Prætor* was by no means limited to a few transactions, but extended to a great variety of objects. Thus it was employed for the protection of things both sacred and religious

as well as for that class of things denominated *res publicæ*; availing for the protection of both person and property; not only of property in the strict sense, but also of that possession which the plaintiff might have obtained. We see from the text that in certain cases (*certis ex causis*) the Prætor or Proconsul in the first instance (*principaliter*) interposed his authority for the termination of disputes. When by such interposition he ordered something to be done, his orders were termed *decreta*. If he forbade the doing of something, to such prohibitions the term *interdicta* was applied. Mr. Long has remarked that Savigny observes, it may be objected to this exposition, that in one of the most important interdicts that “De vi,” the formula is “Judicium dabo.” But, as he observes, the old genuine formula was “Restituas,” and the “Judicium dabo” must have been introduced when the formula of the two old Interdicts—“De vi Armata” and “De vi Quotidiana”—were blended together, and at a time when the distinctions between the old formulæ had become a matter of indifference. 1. 1. Dig. de vi, et de vi armata (43. 16). Cic. Pro Cæcin. 8. 30. Art. “Interdictum,” Diet. Gr. and Rom. Antiq.

The nature and peculiarities of Interdicts were but little understood until the recent discovery of Gaius. The view that prevailed before this epoch in the history of Roman Law was, that an Interdict was simply a summary process, and that it was confined to proceedings *in jure*. This view has been combatted both by Savigny and Puchta, but maintained on new grounds by Thibaut and Mühlenbruch. Von Vangerow the successor to Thibaut, in the chair of Civil Law at Heidelberg holds that the view of Savigny is the correct one. When the plaintiff brought his complaint the Prætor, as Gaius observes, “*Principaliter auctoritatem suam fininendis controversiis interponit.*” If the Interdict failed by the non-obedience of the defendant, the cause thus left undecided in the court of the Prætor went into *judicium*. In this case *judices* or *recuperatores* were appointed to decide which of the parties in the suit was en-

titled to their verdict. When by the non-submission of the defendant, and by the resolution of the plaintiff to assert his right, the suit passed into *judicium*, both litigants were compelled to give security for punitive damages, and they were said "*litigare cum periculo*." Gai. iv. 141. Hence if the suitor were not certain of success, he ran the greatest risk by venturing into *judicium*, and as a consequence of this the Interdict of the Prætor was usually final. The results of the discussion of this subject in recent times seem then to be as follows:—The suit was not necessarily settled *in jure*; but sometimes a *judex* was appointed. When, however, such was the case, there was more than ordinary strictness as to the time within which the decision must be pronounced, or in other words the proceedings *in judicium* were summary and admitted of no delay.

The Interdicts were divided according to their subject matter, and were said to be *prohibitoria*, or *restitutoria*, or *exhibitoria*. Hence Justinian says, "*Summa autem divisio interdictorum hæc est, quod aut prohibitoria sunt, aut restitutoria aut exhibitoria*." Instit. de interdict. (4. 15). As the words themselves denote, an interdict was said to be restitutory when something was to be restored. It was exhibitory when some *thing* or *person* was to be exhibited. It was termed prohibitory when something was forbidden to be done. The form, for example, of an exhibitory Interdict is given by Ulpianus; "Prætor ait: quas tabulas Lucius Titius ad causam testamenti sui pertinentes reliquisse dicetur, si hæ penes te sunt, aut dolo malo tuo factum est, ut desinerent esse, ita eas illi exhibeas. Item si libellus aliudve quid relictum esse dicetur, decreto comprehendam." l. 1. pr. Dig. de tab. exhib. (43. 5.) l. 1. pr. s. 1. Dig. de hom. lib. exhib. (43. 29.) When the Interdict was prohibitory, the technical words employed by the Prætor were "*vim fieri veto*." In the strict sense of the term, the expression Interdict was only applied to those injunctions which were prohibitory, whilst others were named *decreta*. Hence Justinian says: "*Sunt tamen, qui putant*

proprie interdicta ea vocari, quæ prohibitoria sunt, quia *interdicere* est denunciare et prohibere, exhibitoria autem et restitutoria proprie *decreta* vocare." Just. s. 1. de interdict. (4. 15.)

Another division of Interdicts was, according to their object, into *possessoria* and *non possessoria*; of which the most important was the possessory Interdict. This process did not decide the legal question in dispute, for in order to secure such a decision, an *actio* in the strict sense of the term was required, but it had the effect of determining who should have possession of the property. It was simply a personal remedy, by means of which the person in possession was entitled, so to speak, to ward off or prevent any disturbance of his possession. There were also Interdicts not relating to questions of possession, and these were denominated *non-possessory*. The possessory Interdicts may be arranged in three principal classes, namely, *Adipiscendæ possessiones interdicta*; *Retinendæ possessionis interdicta*; and *Recuperandæ possessionis interdicta*. Thus Justinian, following Gaius, says, "Sequens interdictorum divisio hæc est, quod quædam adipiscendæ possessionis causa comparata sunt, quædam retinendæ, quædam recuperandæ." s. 2. Instit. tit. cit. (4. 15.); Gai. iv. 143. By means of the "Interdicta adipiscendæ possessionis causa," the plaintiff obtained possession of a thing, of which at the time of his application to the Prætor he was not in the enjoyment. This Interdict did not decide his legal right, for all that the judge by his decree affirmed, was that the plaintiff was entitled to the possession. Having however obtained this he might be subsequently ousted by a person having a better claim to the property. An important illustration of the "Interdictum adipiscendæ possessionis causa" is presented in the so-called "Interdictum Quorum Bonorum," an Interdict in which the Prætor gave merely the possession without granting anything more. Possession in this case was given on the ground of a testament, which it was possible might be subsequently set aside. This Interdict secured to him

who has been denominated the Prætorian heir, the possession of the things belonging to the *hereditas* of which another person had obtained the possession either *pro herede* or *pro possessore*. The name was derived from the following edict: "Ait Prætor: Quorum Bonorum ex edicto meo illi possessio data est: quod de his bonis pro herede aut pro possessore possides, possideresve si nihil usucaptum esset: quod quidem dolo malo fecisti, uti desineres possidere; id illi restituas." If the legal heir claiming under a testament, "Septem signis testium signatum," presented himself, the party who had obtained the possession by means of the "Interdict Quorum Bonorum" must yield to his claim. Thus Ulpianus says, "Etiam si jure civile non valeat testamentum, forte quod familiæ mancipatio vel nuncupatio defuit, si signatum testamentum sit non minus quam septem testium civium Romanorum signis, bonorum possessio datur." Ulp. tit. 28. s. 6.

Another illustration is furnished in the case of the "Interdictum Salvianum." This was employed when the plaintiff wished to enforce his right over property belonging to a farmer who had conveyed it by mortgage as security for his rent. Instit. s. 2. de interd. (4. 15.) In such a case the possession was given although the contract might not be good. The only question decided by the Interdict related to the possession, and not to the rights under the mortgage which might be subsequently invalidated.

In the case of a "retinendæ possessionis causæ," the person already in possession was protected in his enjoyment by the Prætor declaring that it should not be interfered with. The most usual instances of this remedy were the Interdicta "uti possidetis," and "utrubi." The Interdictum "uti possidetis" was given to secure to the plaintiff the undisturbed possession of an immoveable; the Interdictum "utrubi" for that of a moveable. Gai. iv. 149. The forms of both these Interdicts are preserved in the Digest, and are as follows: "Ait Prætor: Uti eas ædes quibus de agitur, nec vi, nec clam, nec precario alter ab altero possi-

detis, vim fieri veto. De cloacis hoc interdictum non dabo, neque pluris quam quanti res erit, intra annum, quo primum experiundi potestas fuerit, agere permittam." l. 1. pr. Dig. de possid. (43. 17). Ulpianus has also preserved the form of the "Interdictum utrubi." "Prætor ait: Utrubi hic homo quo de agitur, majore parte hujusce anni fuit, quo minus is eum ducat vim fieri veto." And then he adds in accordance with what has been cited from Gaius, "Hoc interdictum de possessione rerum mobilium locum habet; sed obtinuit, vim ejus exæquatam fuisse Uti possidetis interdicto, quod de rerum soli competit, etc." l. 1. pr. s. l. Dig. de Utrubi (43. 31).

The "Interdictum recuperandæ possessionis" was employed by the plaintiff in order that he might obtain the possession of property which he had lost. In this case there was no question as to whether the plaintiff was legally entitled to the property or not. All that he had to prove was that he had been ousted from his possession. When an owner had been violently ejected, the Prætor gave him the "Interdictum unde vi," the effect of which was to place him in precisely the same situation in relation to his property as that which he had enjoyed before his ejection by the unlawful force. To entitle a plaintiff to the Interdictum "unde vi" he must have had a *possessio civilis*, and it must have been immoveable property from which he had been forcibly expelled. This interdict was available within an *annus utilis*, as after the lapse of a year it only availed to the extent "quod ad deicientem pervenit." The form of the Interdict was as follows: "Prætor ait: Unde tu illum vi deiecesti aut familia tua deiecit, de eo, quæque ille tunc ibi habuit, tantummodo intra annum, post annum de eo, quod ad eum, qui vi deiecit, pervenerit, judicium dabo." l. 1. pr. Dig. de vi (43. 16).

Again, if one person had lent something to another out of kindness and the borrower refused to return it, the lender could avail himself of the "Interdictum de precario." The nature of a "precarium" is explained by Ulpianus:

“*Præcarium* est, quod precibus petenti utendum conceditur tamdiu, quamdiu is, qui concessit, patitur.” The same writer distinguishes a “*precarium*” from a gift (*donatio*), and says that it resembled a *commodatum*. “*Et est simile commodato.*” l. 1. Dig. de præc. (43. 26.) Not only might a corporal thing, whether moveable or immoveable, be the object of a “*precarium*,” but also an incorporeal thing, as a servitude. The form of the “*Interdictum de præcario*” has been preserved by Ulpianus. “*Ait Prætor: Quod præcario ab illo habes, aut dolo malo fecisti, ut desineres habere qua de re agitur, id illi restituas.*” It must be carefully observed that these Interdicts decided nothing as to the right of ownership; but they simply determined the dispute respecting the possession *de facto*. Upon the latter point the interdict was conclusive. Paulus *Recep. Sent.* v. 6. 11. l. 4. s. 4 and l. 8. s. 2. l. 15. s. 2. Dig. de præc. (43. 26.) and for a full discussion of the whole subject, Von Vangerow’s *Pandecten*, s. 691. If the defendant disputed the command or decree of the Prætor, the dispute could only be decided by the verdict of the ordinary judicial procedure, that is to say, a *judex* must be appointed, and both parties were bound under a penal stipulation. The Prætor gave a formula *in personam* concepta, and the judge was required to decide not only upon the penal stipulation, but also the principal matter in dispute. Brissonius says in relation to the *sponsio*: “*Quin etiam litigatores olim sponsionem facere certæ pecuniæ solebant quæ ejus lucro cederet, qui judicio vicisset. Cujus rei causa vice mutua stipulationes interponi solebant.*” Cic. lib. vii. ad divers. epist. It was to this *sponsio* that the term *pænalis* was applied. To this there was also added in the formula an *arbitrium*, empowering the judge to decide between the litigants in the principal matter in the suit. In such a case there would be a “*stipulatio certæ pecuniæ*” between the litigants, and an *actio in personam*, in which the judge would be entitled to decide in the principal matter. This was called an *arbitrium Secutorium*, that is an *arbitrium* following the

decision upon the penal stipulation. The person called to defend his title obtained by this interdict, if it were followed by a penal stipulation and an action, a final decision upon the controversy in which the plaintiff had involved him. It was however only in the case of prohibitory interdicts not of exhibitory, nor of restitutory ones that an "arbitrium Secutorium" could be employed.

Closing our remarks upon the Interdict, it may be noticed that the old opinion that the Interdicta "uti possidetis" and "utrubi" were given on account of a *turbatio possessionis*, or on account of *maleficia*, and for the purpose of obtaining compensatory damages for the injury received, though it has been defended by Savigny, cannot be regarded as established. Von Vangerow and most continental jurists of eminence, now hold that both these Interdicts were given for the simple object of deciding which of the two litigants had *actually* the possession of the property. That this is the correct view is distinctly affirmed by the very explicit statement of Ulpianus: "Sed si inter ipsos contendatur, uter possideat, quia alteruter se magis possidere affirmat, tunc, si res soli sit, in ejus possessione contenditur, ad hoc interdictum remittentur." l. 1. s. 3. Dig. uti. pos. (43 17).

141. Nec tamen cum quid jusserit fieri aut fieri prohibuerit, statim peractum est negotium, sed ad judicem recuperatoresve itur, et ibi editis formulis quæritur, an aliquid adversus Prætoris edictum factum sit, vel an factum non sit quod is fieri jusserit. Et modo cum pœna agitur, modo sine pœna: cum pœna, velut cum per sponsionem agitur; sine pœna, velut cum arbiter petitur. Et quidem ex prohibitoriis interdictis semper per sponsionem agi solet, ex restitutoriis vero vel exhibitoriis modo per sponsionem, modo per formulam agitur, quæ arbitraria vocatur.

141. The process, however, is not terminated by the mere command or prohibition of the Prætor that something shall be done or not done; but recourse is had to a judex or to the recuperatores; and there, upon the presentation of the formula, it is enquired whether anything has been done against the edict of the Prætor, or whether that which he enjoined to be done has not been done. And the action is sometimes with a penalty, sometimes without a penalty; for example, with a penalty when the action is by sponsion (*per sponsionem*) without a penalty, when an arbiter is sought for. Indeed it is usual

142. *Principalis igitur divisio in eo est, quod aut prohibitoria sunt interdicta, aut restitutoria, aut exhibitoria.*

JUST. iv. 12. pr.

143. *Sequens in eo est divisio, quod vel adipiscendæ possessionis causa comparata sunt, vel retinendæ vel recuperandæ.*

144. *Adipiscendæ possessionis causa interdictum accommodatur bonorum possessori, cujus principium est QUORUM BONORUM: ejusque vis et potestas hæc est, ut quod quisque ex his bonis quorum possessio aliqui datur est pro herede aut pro possessore (c) possideret, id ei cui bonorum possessio data est restituatur. Pro herede autem possidere videtur tam is qui heres est quam is qui putat se heredem esse: pro possessore is possidet qui sine causa aliquam rem hereditariam vel etiam totam hereditatem, sciens ad se non pertinere, possidet. Ideo autem adipiscendæ possessionis vocatur, quia ei tantum utile est qui nunc primum conatur adipisci rei possessionem: itaque si quis adeptus possessionem amiserit, desinit ei id interdictum utile esse.*

JUST. iv. 15. 3.

always to sue by sponson in the case of prohibitory interdicts, but in the case of restitutory or exhibitory interdicts, the action is sometimes by sponson and sometimes by a formula, which is called arbitrary (*arbitraria*).

142. Therefore the principal division of interdicts consists in this, that they are either prohibitory, restitutory or exhibitory.

143. There is a second division depending on this, that some interdicts are employed for the sake of obtaining possession, others for the sake of retaining possession or recovering it.

144. For the purpose of obtaining possession an interdict is given to the bonorum possessor, of which the commencement is QUORUM BONORUM: the force and effect of such interdict is, that whatever any one as heir (*pro herede*), or as possessor (*pro possessore*) might hold of that property, the possession of which is given to some other person (by the edict), is restored to him to whom the *bonorum possessio* has been granted. But both the real heir as well as he who believes himself to be heir appears to possess as heir (*pro herede*). He holds as possessor (*pro possessore*) who without any legal title takes possession of anything pertaining to the inheritance, or even of the entire inheritance, knowing that it does not belong to him. Hence the interdict is named *adipiscendæ possessionis*, because it is only available for him who now seeks for the first time to obtain the possession of the thing, therefore if anyone who has gained possession has lost it again, that interdict ceases to be available for him.

(c) There is a peculiar interest attaching to the portion of this book from Sec. 134 to the words *aut pro possessore* in this section, as they had been discovered by Maffei in Verona nearly a century before the great discovery made by Niebuhr. See Introduction pp. 15 et seq. Gneist, referring to this interesting passage, says, “Ea qua sequuntur in ss. 134, 144 med. usque ad verba *aut pro possessore continentur in folio illo separato, a Maffeio olim descripto, a Niebuhrio ante Cod. Ver. invento, separatim edito jam cura Hauboldi*” (*Zeitschrift für gesch. Rechtswiss.* iii. p. 140, 146.)

145. Bonorum quoque emptori similiter proponitur, interdictum quod quidam possessorium vocant.

145. In a similar manner an interdict is also provided for the *bonorum emptor* which some call *possessory*.

146. Item ei qui publica bona emerit ejusdem condicionis interdictum proponitur, quod appellatur sectorium, quod sectores vocantur (d) qui publice bona mercantur.

146. Again an interdict of a similar nature is provided for him who has purchased property belonging to the State, which is named *Sectorium*, because those persons are called *Sectores* who purchase things under the authority of the people (*publice*).

(d) A Sector was one who bought the goods of a person proscribed or from the State itself publicly. “Sectorum autem dicit æstimatorem redemptoremque bonorum damnati atque proscripti, qui spem sectans lucri sui, id est secutus spem æstimationis suæ, bona omnia auctione vendit, et semel infert pecuniam vel Ærario vel sociis.” Pseudo-Asconius ad Cic. in Verr. ii. 1. s. 52. 61. Antonius was called the Sector of Pompeius, “quoniam in subhastatione bona Cn. Pompeii redemerat.” Cic. 2. Phil. 75. Rosc. Amer. 49. Nizolius sub voce “Seco.” “Sectores autem dicti sunt, qui spem lucri sui secuti bona condemnatorum semel auctionabantur, proque his pecunias pensitabant singulis, ac in postera pro compendio suo singula quæque pecunia populo venditur.” See Festus, p. 337, and Heumann’s *Handlexicon* sub voce.

147. *Interdictum quoque quod appellatur Salvianum adipiscendæ possessionis comparatum est, eoque utitur dominus fundi de rebus coloni quas is pro mercedibus fundi pignori futuras pepigisset.*

147. An interdict also which is called *Salvianum* was provided for the purpose of obtaining possession, and the owner of land employs it with respect to the property of a farmer, which he has contracted shall be a security for rent.

JUST. iv. 15. 3.

148. *Retinendæ possessionis causa solet interdictum reddi, cum ab utraque parte de proprietate alicujus rei controversia est, et ante quæritur, uter ex litigatoribus possidere et uter petere debeat cujus rei gratia comparata sunt UTI POSSIDETIS et UTRUBI.*
(c)

148. An interdict for the purpose of retaining possession (*retinendæ possessionis*) is usually given when there is a dispute between two parties as to the ownership of a thing, and it is first enquired which of the litigant parties ought to hold possession, and which of the two should sue for the property, on this account the interdicts *possidetis* and *utrubi* are provided.

(e) Paulus says, “*Retinendæ possessionis gratia comparata sunt interdicta, per quæ eam possessionem quam jam habemus retinere volumus: quale est uti possidetis de rebus soli et utrubi de re mobili. Et in priore quidem is potior est, qui redditus interdicti tempore nec vi nec clam nec precario ab adversario possidet. In altero vero potior est qui majore parte anni retrorsum numerati nec vi nec clam nec precario possidet.*” *Recep. Sent. v. 6. s. 1.*

149. *Et quidem UTI POSSIDETIS interdictum de fundi vel ædium possessione redditur, UTRUBI vero de rerum mobilium possessione.*

149. And indeed the interdict *uti possidetis* is given for the possession of land or of a building, but the interdict *utrubi* for the possession of moveable things.

JUST. iv. 15. 4.

150. *Et si quidem de fundo vel ædibus interdicatur, eum potio- rem esse Prætor jubet qui eo tempore quo interdictum redditur nec vi nec clam nec precario ab adversario possideat: si vero de re mobili, tunc eum potio- rem esse jubet qui majore parte ejus*

150. And if indeed the interdict is employed on account of land or of a building, the Prætor adjudges him to have the better right who at the time at which the interdict is given, is in possession as against his adversary, neither by force

anni nec vi nec clam nec precario ab adversario possidet: idque satis ipsis verbis interdictorum significatur.

nor secretly, nor by concession, but if on the other hand, the interdict has reference to moveable things he then has the preference, who during the greater part of that year, obtained the possession from his adversary, neither by force, nor secretly, nor by concession. That is signified with sufficient clearness by the very words of the interdicta.

JUST. IV. 15. 4.

151. *At in UTRUBI interdicto non solum sua cuique possessio prodest, sed etiam alterius (f) quam justum est ei accedere velut, ejus cui heres extiterit, ejusque a quo emerit vel ex donatione aut dotis datione acceperit. Itaque si nostræ possessioni juncta alterius justa possessio exsuperat adversarii possessionem, nos eo interdicto vincimus. Nullam autem propriam possessionem habenti accessio temporis nec datur nec dari potest; nam ei quod nullam est nihil accedere potest. Sed et si vitiosam habeat possessionem, id est aut vi aut clam aut precario ab adversario adquisitam, non datur; nam ei possessio sua nihil prodest.*

151. But in the *interdictum utrubi* not only is a person's own possession of advantage to him, but also that of another person which ought to be accounted to him by virtue of the *jus civile*; for instance, of him for whom he has become heir, and of him from whom he has purchased, or from whom he has received anything by way of gift or by appointment of dower. Therefore we succeed with that interdict, if the legal possession of another joined to our possession surpasses the possession of our adversary. But to him who has no possession of his own, the accession of time is neither given nor can be given. For to him who has no possession, nothing can be added by way of accession. But also if he have a wrongful (*vitiosa*) possession, that is a possession acquired from his adversary either by force or secretly, or by concession, the accession of time is not given; for his possession does not help him in the least.

(f) We learn from this that the whole time which the predecessor of the person availing himself of the Interdict had been in possession was reckoned to the plaintiff. This at times must have been of the greatest importance to one who sought to perfect his title by prescription.

152. Annus autem retrorsus numeratur. Itaque si tu verbi gratia anni mensibus possederis prioribus v, et ego vii posterioribus, ego potior ero quantitate mensium possessionis; nec tibi in hoc interdicto prodest, quod prior tua ejus anni possessio est.

153. Possidere autem videmur non solum si ipsi possideamus, sed etiam si nostro nomine aliquis in possessionem sit, licet is nostro juri subjectus non sit, qualis est colonus et inquilinus. Per eos quoque apud quos deposuerimus, aut quibus commodaverimus, aut quibus gratuitam habitationem constituerimus, ipsi possidere videmur. Et hoc est quod volgo dicitur, retineri possessionem posse per quemlibet qui nostro nomine sit in possessione. Quinetiam plerique putant animo quoque retineri possessionem, quod nostrorum præceptorum sententia est. (g) Diversæ autem scholæ auctoribus contrarium placet ut animo solo, quamvis voluerimus ad rem reverti, tamen retinere possessionem non videamur. Apisci vero possessionem per quos possimus secundo commentario rettulimus; nec ulla dubitatio est, quin animo possessionem apisci non possimus.

152. But the year is reckoned backwards. Therefore, if you for example have held possession for the first five months of the year, and I the seven last, I should have the preference with respect to the number of months' possession; nor would it be of advantage to you in this interdict, that your possession fell in the previous part of the year.

153. Moreover we seem to possess not only if we are ourselves in possession, but also if anyone is in possession in our name, although he be not subject to our power, such as a tenant of a farm and a lodger. We ourselves appear to possess also through those with whom we have deposited anything, or to whom we have given a thing as a *commodatum*, or to whom we have granted a dwelling free of charge. And this is what is commonly said, that possession may be retained by anyone who is in possession in our name. Moreover, according to the opinion of many jurists, possession is also retained by the intention (*animo*) and such is the opinion of the teachers of our school. But the doctors of the opposite schools are of a contrary opinion, declaring that although we have intended a thing to be returned to us, still we do not seem to retain its possession by the intention alone. But we have explained in the second commentary who those persons are by whom we may obtain possession. Nor is there any doubt that by the intention alone we cannot acquire possession.

(g) Gneist, in the text has followed the reading of Huschke, though regarding it as one open to doubt. Heffter proposed to read, "quæ nostrorum opinio est. Nam his etiam placuit, ut quoniam possidemus animo solo, quando voluerimus reversuri abire, retinere possessionem videamur." Boecking supplied "quod nostrorum . . . animo solo, quia voluerimus, ex quo discessimus reverti, retinere possessionem videamur." ll. 44, 46. Dig. de acq. poss. (41. 2.)

154. Recuperandæ possessionis causa solet interdictum dari, si quis vi dejectus sit. Nam ei proponitur interdictum cujus principium est: UNDE TU ILLUM VI DEJECISTI. Per quod is qui deiecit cogitur ei restituere rei possessionem, si modo is qui dejectus est nec vi nec clam nec precario possidet ab adversario: quod si aut vi aut clam aut precario possiderit, impune deicitur.

JUST. iv. 15. 6.

155. Interdum tamen etiam ei quem vi dejecerim, quamvis a me aut vi aut clam aut precario possiderit, cogar rei restituere possessionem, velut si armis eum vi dejecerim: nam Prætor (h) . . . [desunt quattuor lin.]

154. An interdict for the purpose of regaining possession (*recuperandæ possessionis*) is generally given if any one has been ejected by force. For such an one an interdict is provided the commencement of which is as follows: "Whence you have violently ejected him." By means of this he who has caused the ejectment is compelled to restore possession, provided he who has been ejected possesses from his opponent, neither by violence, nor clandestinely, nor by concession; because if he has obtained possession either by force or clandestinely, or by concession, he may be ejected with impunity.

155. Still, sometimes I may be compelled to restore the possession of the property to him whom I have ejected by force, although he may have obtained possession from me, either by violence or secretly, or by concession, for example, if I have ejected him by force of arms; for the Prætor . . .

(h) The *Interdictum Unde vi* we see from the previous section was given to enable the owner to recover the possession of an immoveable thing from which he had been ejected by violence or by the dread of an impending evil. It must not, however, be an empty or groundless fear. Ulpianus says, "Metum autem præsentem accipere debemus, non

suspicionem inferendi ejus," and referring to Pomponius he adds, "Denique tractat, si fundum meum dereliquero, audito quod quis cum armis veniret, an huic Edicto locus sit; et refert Labeonem existimare, Edicto locum non esse, et Unde vi interdictum cessare, quoniam non videor vi dejectus, qui dejici non expectavi, sed profugi. Aliter atque si, posteaquam armati ingressi sunt, tunc discessi; huic enim Edicto locum facere." l. 9. pr. Dig. quod metus causa (4. 2). Justinian allowed the *Interdictum Unde vi* to be used by a person even though he might have obtained the possession by force, or clandestinely, or as a concession from the person who had expelled him. Instit. 5. 6. de interd. (4. 15). The *Interdictum Unde vi* was limited to immoveables; the actiones "furti," "vi bonorum raptorum" and "ad exhibendum," being given to protect the possession of things moveable.

Two kinds of violence were distinguished: ordinary violence (*vis quotidiana*), and violence by an armed force. Justinian, in the passage just cited, included under the term arms, not only shields, swords, and helmets, but also sticks and stones. By a later Imperial Constitution the *Interdictum Unde vi* became applicable to moveables as well as to immoveables. l. 7. Cod. Unde vi (8. 4). The *Interdictum Unde vi* was annual, that is to say it must be employed within the year after the happening of the event by which the plaintiff had been deprived of his property, except in the case of expulsion by an armed band, or when the violence had been exercised, not on the possessor himself, but on his clients. The "Interdictum de clandestina possessione" was given to recover the possession of property from one who came stealthily into its possession. The "Interdictum de precario" enabled the party to whom the property belonged to enter upon it at once, and to re-obtain the possession. On this subject see Domenget's note in loco.

156. Tertia divisio interdictorum in hoc est, quod aut simplicia sunt aut duplicia.

156. The third division of interdicts is that they are simple (*simplicia*), or double (*duplicia*).

JUST. iv. 15. 7.

157. *Simplicia velut in quibus alter actor, alter reus est: qualia sunt omnia restitutoria aut exhibitoria. Nam actor est qui desiderat aut exhiberi aut restitui, reus is est a quo desideratur ut exhibeat aut restituat.*

157. Those are simple in which one person is plaintiff and the other defendant; such are all restitutory or exhibitory interdicts. For the plaintiff is he who desires either the production or restitution: the defendant is he from whom the production or restitution is desired.

JUST. IV. 15. 7.

158. *Prohibitoriorum autem interdictorum alia duplicia, alia simplicia sunt.*

158. Moreover, of the prohibitory interdicts some are double, others are simple.

JUST. IV. 15. 7.

159. *Simplicia sunt veluti quibus prohibet Prætor in loco sacro aut in flumine publico ripave ejus aliquid facere reum: nam actor est qui desiderat ne quid fiat, reus is qui aliquid facere conatur.*

159. Those are simple for example, by means of which the Prætor prohibits the defendant from doing anything in a sacred place, or in a public stream, or on its bank. For the plaintiff is he who desires that nothing may be done: the defendant is he who endeavours to do the thing.

160. *Duplicia sunt, velut UTI POSSIDETIS interdictum et UTRUBI. Ideo autem duplicia vocantur, quia par utriusque litigatoris in his condicio est, nec quisquam præcipue reus vel actor intellegitur, sed unusquisque tam rei quam actoris partes sustinet: quippe Prætor pari sermone cum utroque loquitur. Nam summa conceptio eorum interdictorum hæc est: "uti nunc possidetis, quominus ita possideatis vim fieri veto." Item alterius: "utrubi hic homo de quo agitur, apud quem majore parte hujus anni fuit, quominus is eum ducat vim fieri veto."*

160. Others are double, as for example, the interdicts *Uti possidetis* and *Utrubi*. Now they are called double, because the condition of both the litigants is the same in these respects; that neither is specially understood to be defendant or plaintiff, but each one sustains the character both of defendant and plaintiff, since the Prætor speaks in the same form of expression to both. For the general formula of these interdicts is as follows, "I forbid force to be employed, so that you should not continue to possess as you now possess;" and in like manner the other interdict ran, "I forbid force to be employed, to prevent

the slave, in reference to whom this action is brought, being taken by that one of the two parties with whom he has been for the greater part of this year."

JUST. iv. 15. 7.

161. *Expositis generibus interdictorum sequitur ut de ordine et de exitu eorum dispiciamus; et incipiamus a simplicibus.*

162. *Si igitur restitutorium vel exhibitorium interdictum redditur, velut ut restituatur ei possessio qui vi dejectus est, aut exhibeatur libertus cui patronus operas indicere vellet, modo sine periculo res ad exitum perducitur, modo cum periculo.*

161. Having set forth the kinds of Interdicts, it follows that we investigate their process and termination. Let us commence with the simple interdicts.

162. If therefore a restitutory or an exhibitory interdict is given, as for instance, that the possession may be restored to him who has been ejected by violence, or that a libertus may be produced to whom a patron wishes to appoint his services; sometimes the matter is brought to a conclusion without danger, sometimes with danger.

163. *Namque si arbitrum postulaverit is cum quo agitur, accipit formulam quæ appellatur arbitraria. Nam judicis arbitrio si quid restitui vel exhiberi debeat, id sine poena exhibet vel restituit, et ita absolvitur: quod si nec restituat neque exhibeat, quanti ea res est condemnatur. Sed actor quoque sine poena experitur cum eo quem neque exhibere neque restituere quicquam oportet, nisi calumniæ judicium ei oppositum fuerit. Diversæ quidem scholæ auctoribus placet prohibendum calumniæ judicio eum qui arbitrum postulaverit, quasi hoc ipso confessus videatur restituere se vel exhibere debere. Sed alio jure utimur, et recte: namque sine ullo timore ne superetur, arbitrum quisque postulare potest. (i)*

163. If indeed the defendant has demanded an arbiter, he adopts the formula which is called *arbitraria*. For if by the arbitration of the judge anything is required to be restored or exhibited, that thing is exhibited or restored without penalty, and thus he is absolved; yet if he should neither restore nor produce the thing, he is condemned to pay its estimated value. But the plaintiff sues without a penalty that defendant who is obliged neither to exhibit nor to restore anything, unless a *judicium calumniæ* has been granted against him. The doctors indeed of the opposite school are of opinion that he who has petitioned for an arbiter, must be restrained from a *judicium calumniæ*, [for they say]

he seems by this very act to confess that he ought to make restitution or to exhibit. But we recognize another principle of law, and correctly; for each party is at liberty to petition for an arbiter without any fear lest he should not succeed.

(i) A *calumnia* consisted in an attempt made by one person to violate the right of another under the pretence of some legal act. It was applied especially to an unjust legal process, whether civil or criminal. In regard to criminal matters Marcianus says, "Calumniari est, falso crimina intendere, etc." l. 1. Dig. ad S.C. Turp. et de abol. crim. (48. 16.) Paulus gives a definition of *calumnia* which will apply to both civil and criminal calumny: "Calumniosus est qui sciens prudensque per fraudem negotium alicui comparat." Recept. Sent. I. 5. s. 1. We find also such expressions as the following, which serve to explain the nature of judicial calumny. "Qui de ingenuitate cognoscunt, de calumnia ejus, qui temere controversiam movit, ad modum, etc." l. 39. Dig. de lib. causa (40. 12). Also "Qui per calumniam vocabatur." l. 4. s. 1. Dig. ne quis eum, etc. (2. 7.) "Qui injuriarum actionem per calumniam instituit extra ordinem damnatur." l. 43. Dig. de injur., etc. (47. 10.) Ulpianus says, "Notatur (*infamia*), quæ per calumniam ventris nomine in possessionem missa est, dum se asseverat prægnantem." l. 15. Dig. de his, qui notantur infamia, (3. 2). "Per calumniam autem in possessione fuisse videtur, quæ sciens prudensque se prægnantem non esse, voluit in possessionem venire." l. 1. s. 2. Dig. Si mulier, etc. (25. 6.) The punishment for *calumnia* was fixed by the *lex Remmia*. l. 2. Dig. ad S.C. Turp., etc. (48. 16). It would appear from Cicero that the *calumniator* was sometimes branded on the forehead with the letter K, the initial of Kalumnia. "Sin autem sic agetis litteram illam, cui vos usque eo inimici estis, ut etiam eas

omnes oderitis, ita vehementer ad caput affigent, ut postea neminem alium, nisi fortunas vestras, accusare possitis." Gaius and Paulus state the punishments for *calumnia* to be "exsilium, relegatio insulæ, et ordinis amissio" (*loss of rank*); l. 43. Dig. de injur. 47. 10. Recep. Senten. v. 1. 5. v. 4. 11. Cic. Pro Sex. Ros. Amer. c. 20. Heumann's Handlexicon, and Dict. Gr. and Rom. Antiq. sub voce "Calumnia."

164. *Ceterum observare debet is qui volet arbitrum petere, ut statim petat, antequam ex jure exeat id est antequam a Prætoris discedat: sero enim petentibus non indulgetur.*

165. *Itaque si arbitrum non petierit sed tacitus de jure exierit, cum periculo res ad exitum perducitur. Nam actor provocat adversarium sponcione: NI CONTRA EDICTUM PRÆTORIS NON EXHIBUERIT AUT NON RESTITUERIT ille autem adversus sponcionem adversarii restipulatur. Deinde actor quidem sponcionis formulam edit adversario; ille huic invicem restipulationis. Sed actor sponcionis formulæ subicit et aliud judicium de re restituenda vel exhibenda, ut si sponcione vicerit, nisi ei res exhibeatur aut restituatur*

[Desunt 48 lin.]

166. *Postquam igitur Prætor interdictum reddidit, primum litigatorum alterutrius res ab eo fructum licitando (j) rei tantisper in possessione constituitur, si modo adversario suo fructuaria stipulatione satisfaciat, cujus*

164. But he who wishes to petition for an arbiter ought to observe, that he should petition at once, before he goes *ex jure*, that is, before he leaves the court of the Prætor: for to those who petition too late the privilege will not be granted.

165. Therefore if an arbiter is not sought, but the suit passes silently out of court (*ex jure*), it is brought to a termination with danger. For the plaintiff cites his adversary with the sponcion, "Unless contrary to the edict of the Prætor he shall have neither exhibited nor restored;" but the defendant restipulates against the sponcion of his opponent. Then the plaintiff indeed pleads the formula of sponcio against his adversary; and he in his turn that of the restipulation. But the plaintiff joins to the formula of the sponcion another *judicium* for the restitution or exhibition of the thing, so that if he has succeeded with the sponcion, [his opponent will be condemned for the estimated value], unless the thing is exhibited or restored to him.

166. Therefore, after the Prætor has granted the Interdict, at first the property in dispute is assigned to the temporary possession of one or other of the litigants, on his purchasing at the best price the

potestas hæc est, ut si contra ipsum esset postea pronuntiatum, fructus duplam præstet. Nam inter adversarios qui Prætore auctore certant, dum contentio fructus licitationis est, scilicet quia possessorem interim esse interest, rei possessionem ei Prætor vendit, qui plus licetur. Postea alter alterum sponsione provocat: NISI ADVERSUS EDICTUM PRÆTORIS POSSIDENTIBUS NOBIS VIS FACTA ESSET. Invicem ambo restipulantur adversus sponsonem vel [desunt 4 lin.] iudex aput quem de ea re agitur illud scilicet requirit quod Prætor interdicto complexus est, id est uter eorum eum fundum easve ædes per id tempus quo interdictum redditur nec vi nec clam nec precario possideret. Cum iudex id exploraverit, et forte secundum me iudicatum sit, adversarium quidem et sponsonis et restipulationis summas quas cum eo feci condemnat, et convenienter me sponsonis et restipulationis quæ mecum factæ sunt absolvit. Et hoc amplius si aput adversarium meum possessio est, quia is fructus licitatione vicit, nisi restituat mihi possessionem, Cascelliano sive secutorio iudicio condemnatur.

produce of the property, (*ab eo fructum licitando*), provided he has given security to his opponent by means of the *fructuaria stipulatio*, the operation of which is; that if the decision should be afterwards pronounced against him, he shall be answerable for double the value of the produce. For whilst between litigant parties who sue by the authority of the Prætor the contention is for the purchase of the produce, the Prætor sells the possession of the thing to him who bids highest for it, because it is clearly advantageous that there should be an *ad interim* possessor. After this the one cites the other by the form of sponson, "Unless contrary to the edict of the Prætor violence has been done to us in possession." Both parties in their turn restipulate against the sponson or The judge before whom the suit is conducted ascertains what the Prætor has embraced in his Interdict, that is to say, which of the two was in possession of that estate, or of that house, during the time to which the Interdict relates, neither by force, nor secretly, nor by concession. As soon as the judge has investigated that, supposing he has decided the point in my favour, he condemns my adversary to the amount both of the sponson and of the restipulation which I have made with him; and conformably therewith he absolves me from the sponson and restipulation which have been made with me. And in addition to this, if the possession is with my adversary, because he has succeeded in purchasing the produce; he is condemned by virtue of the *Cascellianum* or *Secutorium iudicium* unless he restore possession to me.

(j) The verbs *liceri* and *licitari* mean to bid upon a thing put up to auction: or “*Pretium augeri quum sit auctio.*” Cic. Verr. 2. 3. 33. A *Licitator* is one “*qui pretium auget.*” In reference to this meaning of the word, Ulpianus says, “*Nam ad licitationem rem deducere, ut, qui licitatione vicit, hic habeat instrumenta hereditaria, non placet, neque mihi, neque Pomponio.*” l. 6. Dig. fam. ercis. (10. 2.) When two or more parties were entitled to a thing, and when a physical division was unadvisable, recourse might be had to the lot, or the thing might be put up to auction, in which case, sometimes others than those entitled to share were permitted to bid. Thus it is said, “*Ad licitationem nonnunquam etiam extraneo emptore admissio, maxime si se non sufficere ad justa pretia alter ex sociis sua pecunia vincere vilius licentem (licitantem) profiteatur.*” l. 3. Cod. com div. (3. 37.) The *licitatio* took place in the case of the *Interdict*, so that the *Prætor* might put one of the parties to the suit in provisional possession until the period when the judge should give his decision. To effect this the *Prætor* caused, as it were, a bidding to be made in his presence; that is to say, he accorded the *ad interim* possession to the one who was prepared to give to the other the best guarantee that he would restore the thing and the amount of the produce accruing in the interval, if the judge should decide that the thing did not belong to the party thus in possession. See *Domenget in loco.*

167. Ergo is qui fructus licitatione vicit, si non probat ad se pertinere possessionem, sponsionis et restipulationis et fructus licitationis summam pœnæ nomine solvere et præterea possessionem restituere jubetur: et hoc amplius fructus quos interea percepit reddit. Summa enim fructus licitationis non pretium est fructuum, sed pœnæ nomine solvitur, quod quis alienam possessionem per hoc

167. Therefore he who has succeeded in purchasing (*licitatio*) the fruits, if he does not prove the possession to belong to him, is ordered to pay in the shape of penalty the value of the *sponsio*, and of the *restipulatio*, as well as of the *licitatio fructus*; and is moreover to give up possession: and in addition to this he gives back the produce, which he has obtained in the in-

tempus retinere et facultatem fruendi nancisci conatus est.

168. Ille autem qui fructus licitatione victus est, si non probarit ad se pertinere possessionem, tantum sponsonis et restipulationis summam pœnæ nomine debet.

169. Admonendi tamen sumus liberum esse ei qui fructus licitatione victus erit, omitta fructuaria stipulatione, sicut Cascelliano sive secutorio judicio de possessione recipienda *experitur*, ita *separatim* et de fructus licitatione *agere*: in quam *rem* proprium judicium comparatum est, quod appellatur fructuarium, quo nomine actor *judicatum solvi* satis accipit. Dicitur autem et hoc judicium secutorium, quod sequitur sponsonis victoriam; sed non æque Cascellianum vocatur.

170. Sed quia nonnulli interdicto reddito cetera ex interdicto facere nolebant, atque ob id non poterat res expediri, Prætor comparavit interdicta. (k)

[Desunt 47 lin.]

terval. For the sum paid on account of the *licitatio fructuum* is not the actual price of the fruits, but is paid by way of penalty, because he has, during this time, endeavoured to retain possession of another's property together with the power of the enjoyment of the fruits thereof.

168. But he who has not succeeded in obtaining the enjoyment of the produce (*fructus licitatione*), if he has not proved that the possession belongs to him, has to pay as a penalty only the value of the *sponsio* and the *restipulatio*.

169. Still we must mention that he who has not succeeded in obtaining the produce by licitation, is at liberty, if the *fructuaria stipulatio* has been omitted, to bring a separate action with respect to the sale of the produce, just as he may avail himself of the Cascellianum or Secutorium *judicium* for the purpose of regaining possession. For this purpose a peculiar form of *judicium* is prepared, which is called *fructuarium*; by means of this the plaintiff receives security for the payment of what is decreed by the judge. This action (*judicium*) is called Secutorium, because it comes after (*sequitur*) the success with the sponson, but it is not rightly called Cascellianum.

170. But because some persons, when the interdict had been granted, were unwilling to perform other things beyond the scope of the interdict, and on that account the matter was not completed, the Prætor has provided Interdicts.

(*k*) Gneist says that in page lxxiv^b of the MS., only the following words can be re read: line 1, comparavit interdicta; line 10, et cetera ex interdicto; line 13, sine causa; line 15, fuerint. Huschke proposes to complete the last clause of this section thus: "Prætor, illi, qui vult expediri, propria comparavit interdicta, duo scilicet, quia aut de possessione fundi vel ædium agitur, aut de possessione rerum mobilium."

171. *Sed adversus reos quidem infitiantes ex quibusdam causis dupli actio constituitur, velut si judicati aut depensi aut damni injuriæ aut legatorum per damnationem relictorum nomine agitur: ex quibusdam causis sponsonem facere permittitur, velut de pecunia certa credita et pecunia constituta: sed certæ quidem creditæ pecuniæ tertiæ partis, constitutæ vero pecuniæ partis dimidiæ.*

171. An action also is provided in certain cases with a double penalty against defendants who deny their liability; for example, if the action brought is one of the form *judicati* or *depensi*, or *damni injuriæ*; or of that employed for legacies left *per damnationem*. In some cases the *sponsio* may be adopted, as when the action is for a certain sum lent (*l*) and for an agreed amount; in the case of a definite loan (*certa credita pecunia*) the *sponsio* is for a third part, but in that of an agreed amount (*constituta pecunia*) for the half.

(*l*) For definition of *credita pecunia*, see Gai. iii. 124.

172. *Quodsi neque sponsionis, neque dupli actionis periculum ei cum quo agitur jungatur, aut ne statim quidem ab initio pluris quam simpli sit actio, permittit Prætor jusjurandum exigere NON CALUMNIÆ CAUSA INFITIAS IRE; unde quia heredes vel qui heredum loco habentur, numquam pœnis obligati sunt, item feminis pupillisque remitti solet pœna sponsionis jubet modo eos jurare.*

172. But if the defendant is neither exposed to the danger of the *sponsio*, nor the action for the double, or if indeed the action be from the very commencement for not more than the simple claim, the Prætor permits the exaction of an oath, "that he does not deny for the sake of vexatious litigation:" hence because heirs or those who stand in the place of heirs, are never bound in penalties, and because the penalty of the *sponsio* is usually remitted to women and pupils, the Prætor orders such persons to take this oath.

173. Statim autem ab initio pluris quam simpli actio est, velut furti manifesti quadrupli, nec manifesti dupli, concepti et oblati tripli : nam ex his causis et aliis quibusdam, sive quis neget sive fateatur, pluris quam simpli est actio.

173. But sometimes the action is brought for more than a *simplum* from the very beginning, as for example, the action *furtum manifestum* is for the fourfold, the action *nec manifestum* for the double, the action *conceptum* and *oblatum* for the threefold : for in these and certain other cases, whether anyone denies or admits the charge, the action is for more than the simple value.

JUST. iv. 16. 1.

174. Actoris quoque calumniæ coercetur modo calumniæ iudicio, modo contrario, modo jurejurando, modo restipulatione.

174. Also a vexatious prosecution by a plaintiff is sometimes prevented by the *iudicium calumniæ*, sometimes by a *iudicium contrarium*, sometimes by an oath, sometimes by the restipulation.

JUST. iv. 16. 1.

175. Et quidem calumniæ iudicium adversus omnes actiones locum habet. Et est decimæ partis causæ ; adversus interdicta autem quartæ partis causæ.

175. And indeed the *iudicium calumniæ* is available in all actions ; and amounts to the tenth part of the object in litigation, but in the case of Interdicts to the fourth part.

176. Liberum est illi cum quo agitur aut calumniæ iudicium opponere, aut *jusjurandum* exigere non calumniæ causa agere.

176. The defendant is at liberty either to avail himself of the *iudicium calumniæ* or to demand from the plaintiff an oath that he is not suing on a vexatious ground.

† 177. Contrarium autem iudicium ex certis causis constituitur : velut si injuriarum agatur, et si cum muliere eo nomine agatur, quod dicetur ventris nomine in possessionem missa (l) dolo malo ad aliam possessionem transtulisse ; et si quis eo nomine agat, quod dicat se a Prætoris in possessionem missum ab alio quo admissum non esse. Sed adversus injuriarum quidem actionem decimæ

177. But the contrary action (*contrarium iudicium*) is appointed for some determinate cases ; as in the action for injuries, and if an action is brought against a woman on the ground that having been put into possession in the name of her unborn child, she is alleged to have fraudulently transferred the possession to another : also if anyone sues on this account alleging that he was

partis datur; adversus vero duas istas quintæ. (m)

assigned possession by the Prætor, but has been prevented from entering upon his property by some other person. The penalty is given for the tenth part in the action for injuries, but in the two last actions it is given for the fifth part.

(m) The wife of a defunctus might obtain possession of the inheritance by virtue of the inchoate right of an unborn child. The *fætus* or *venter* although considered whilst in the womb of the mother, as *pars viscerum*, was yet favoured by the law, when its interests were at stake. “Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quoties de commodis ipsius partus quæritur, quamquam alii, antequam nascatur, nequaquam prosit.” l. 7. Dig. de statu hom. (1. 5). If the woman were thus pregnant with the possibility of giving birth to a child who would be the “proximus agnate,” the possession was given to her in favour of her unborn child. Thus Ulpianus says, “Proximus a filio postumo heres, dum mulier prægnans, aut putatur esse, adire hereditatem non potest, sed si scit, non esse prænantem, potest.” l. 30. s. 1. Dig. de acq. vel omit. (29. 2). Voet says, “Postquam ex inspectione constat prænantem esse mulierem, Prætor eam ventris nomine mittit in possessionem bonorum mariti defuncti, ut inde alatur, donec enixa fuerit.” He afterwards adds, “Ac proinde, si mulier in possessionem ventris nomine missa, aut pater, in cujus potestate est, eandem in alium dolo malo transtulerit, prodita est actio prætoria in factum, etc.” lib. xxv. tit. v. Com. ad Pand.; Mühlenbruch Pand. s. 177

178. Severior autem coercitio est per contrarium judicium: nam calumniæ judicio x partis nemo damnatur, nisi qui intellegit non recte se agere, sed vexandi adversarii gratia actionem instituit, potiusque ex judicis errore vel iniquitate victoriam sperat

178. But the punishment established by the contrary action (*contrarium judicium*) is more severe; for in the *judicium calumniæ*, no one is condemned for the tenth part (of the amount in litigation), except one who knowing he has no good ground of

quam ex causa veritatis; calumnia enim adfectu est, sicut furti crimen. Contrario vero iudicio omni modo damnatur actor, si causam non tenuerit, licet aliqua opinione inductus crediderit se recte agere.

179. Utique autem ex quibus causis contrario iudicio agere potest, etiam calumniæ iudicium locum habet: sed alterutro tantum iudicio agere permittitur. Qua ratione si iusjurandum de calumnia exactum fuerit, quemadmodum calumniæ iudicium non datur ita et contrarium non dari debet.

180. Restipulationis quoque pœna ex certis causis fieri solet: et quemadmodum contrario iudicio omnimodo condemnatur actor, si causam non tenuerit, nec requiritur an scierit, non recte se agere, ita etiam restipulationis pœna omnimodo damnatur actor.

181. Sane si ab actore ea restipulationis pœna (n) petatur, ei neque calumniæ iudicium opponitur, neque

action, has instituted the suit for the sake of annoying his opponent, and thus hopes to succeed rather through the error of the judge, or by miscarriage of justice, than on account of the validity of his claim. For malicious prosecution (*calumnia*), like the crime of stealing, consists in the intention. But yet in the contrary action (*contrarium iudicium*), the plaintiff is always condemned, if he has not succeeded in his suit, although acting under advice he believed that he had good ground of action.

179. But certainly in some cases in which we may sue by a contrary action (*contrarium*), the *iudicium calumniæ* may also be employed; but it is only permitted to sue in one or the other of these modes. In accordance with this principle if the defendant has exacted the oath *de calumnia*, and on this account the action for vexatious prosecution is not given to him, so also the contrary action ought not to be given.

180. The penalty also of restipulation is incurred in certain defined cases: and as in the contrary action (*contrarium iudicium*) the plaintiff is always condemned if he has not succeeded in his suit (*causam non tenuerit*), and it is not ascertained whether he knew he had no just ground of action, so also the plaintiff is always condemned in the penalty of restipulation.

181. If indeed that penalty of restipulation is sued for by the plaintiff, the action of vexatious prosecution

jurisjurandi religio injungitur: nam contrarium judicium in his causis locum non habere palam est.

(*calumniæ judicium*) is not brought against him, nor is the obligation of an oath imposed upon him: though it is manifest that the contrary action (*contrarium judicium*) is not admissible in these cases.

(n) Huschke in his Kritik proposes as the correct reading, "Interdum si ab actore cum restipulationis pœna, etc.," and in his edition of Gaius he has himself followed this reading. Upon the difficult subject of the Sponsion, and the Restipulation, consult Huschke Kritik p. 220. et seq. This writer says that in early times—the times of the legis actiones—both sides were liable for penalties when recourse was had to the Interdict. At a subsequent period when Civil Process came to be, so far as the parties themselves were concerned, of a private nature, there arose in the place of these penalties Sponsions and Restipulations. The alteration which took place was, however, simply in the mode in which the penalty was inflicted and not in the principle upon which it was based. The process by Interdict, resting as it did upon the decrees of the magistrate, continued up to the latest time as a strict and imperative mode of procedure which a defendant dare not resist, except at his peril.

182. Quibusdam judiciis damnati ignominiosi fiunt, velut furti, vi bonorum raptorum, injuriarum, item pro socio, fiduciæ, tutelæ, mandati, depositi. Sed furti aut vi bonorum raptorum aut injuriarum non solum damnati notantur ignominia, sed etiam pacti: idque ita in edicto Prætoris scriptum est. Et recte: plurimum enim interest utrum ex delicto aliquis an ex contractu debitor sit. . . .

(Nearly five lines are wanting).

182. In certain actions those who are condemned are branded as infamous; such are the actions of theft, of property taken with violence, of injuries; also the actions arising out of partnership, of trusts, of guardianship, of a mandate, or of a deposit. But in the actions of theft, or property taken with violence, or for injuries, not only are those who are condemned branded as infamous, but also their accomplices; and this is so written in the edict of the Prætor: and justly so, for it makes a great difference whether any one is under a bond arising from a delict, or a contract . . .

183. In summa sciendum est eum qui aliquem in jus vocare vult et cum eo agere, et eum qui vocatus est [desunt 2½ lin.] patrono et liberto [½lin.] et in eum qui adversus ea egerit, pœna constituta est.

183. Finally we ought to know that he who wishes to cite anyone before the Prætor in order to sue him and he who has been cited . . . to the freedman, and his patron . . . and a penalty has been fixed against him who shall have sued in spite of these prohibitions.

184. Quando autem in jus vocatus fuerit adversarius, ni eo die finitum fuerit negotium, vadimonium ei faciendum est, id est, ut promittat se certo die sisti. (o)

184. But when the defendant has been cited before the Prætor, if the cause has not been finished on that day, security (*vadimonium*) must be given by him, that is to say, he must promise to appear again on a certain day.

(o) We have already seen that the process commenced by an act of the plaintiff denominated "in jus vocatio," and that there was in early times no means of arrest provided by the State. (p. 625 et seq.) The plaintiff might by the authority of the Twelve Tables lawfully use force if the defendant refused to appear before the Prætor. If a man concealed himself or strove in any way to avoid the "in jus vocatio," he exposed himself to a penalty in the form of the sequestration of his goods (*actor in bona mittebatur*). Again, when the parties were before the Prætor, the defendant was required to give security for his reappearance in court on a given day, unless indeed the dispute were settled at once. The defendant on finding a surety, was said "vades dare," "vadimonium promittere," or "facere:" the surety, "vas" was said "spondere;" the plaintiff when satisfied with the surety was said "vadari reum," to let him go on his sureties, or to have sureties from him. See note to Gai. iv. s. 21. l. 22. s. 1. Dig. de in jus voc. (2. 4.) "Actio" Dict. Gr. and Rom. Antiq. The defendant, if he were able, might obtain his freedom by securing a *vindex*. This mode of procedure lasted for many centuries. The influence, however, of the Prætor was felt in civil procedure as well as in

the other departments of Roman jurisprudence, so that certain persons, times and places were grounds for the amelioration of the strict law, and security came to be taken in the place of a *vindex*. If, however, after the defendant had given security to appear before the Prætor on a certain day, he failed to surrender himself, the old law with all its harshness took effect. It was when the investigation did not take place on the day of the appearance of the suitors before the Prætor, or when it did not terminate on that day, that the defendant was obliged to give *vadimonium* or security. In regard to the commencement of proceedings, an important change took place in the time of Marcus Aurelius, for in place of the "Vadimonium," a simple "Denunciation" was permitted. The term "Vadimonium" was not only applied to the security, but also to the day; hence, Brissonius says, "Vadimonium, a vadium dictum, non sponsionem modo alterius sistendi, sed et constitutum diem significat, quo quis se judicio adsunt, vadimonium obire, et ad vadimonium occurrere a Latinis dicuntur." Sub voce "Vadimonium." Cic. pro Quinto Cap. xvii. At a later period the commencement of the process by the "Denunciation" ceased, and a libellus signed by the plaintiff, containing a brief account of the grounds upon which the action was based, and the facts of the case generally, was substituted in its place. This was communicated by an officer of the court to the defendant, who was bound within a certain time to give a written acknowledgement of the receipt of the plaintiff's pleading. The defendant had further in giving security for his appearance, either to find bail, or to take an oath, or make a simple promise, according to circumstances. If security were not given, the officer of the court (*executor*) who served the process was bound to hold the defendant in safe keeping and to have him in court at the proper time. For the later practice in relation to Securities see Instit. de satisfactionibus (4. 11). Nov. 53. præf. c. 3. l. 4. s. 1. Cod. de spartul. (3. 2). l. 17. Cod. de dignit. (12. 1). l. 25. s. 1.

l. 33. s. 3. Cod. de episc. (l. 3). Walter's Rechtsgesch. ss. 692, 694, 709.

185. *Fiunt autem vadimonia quibusdam ex causis pura, id est sine satisfactione, quibusdam cum satisfactione, quibusdam jurejurando, quibusdam recuperatoribus suppositis, id est ut qui non steterit, is protinus a recuperatoribus in summam vadimonii condemnatur: eaque singula diligenter Prætoris edicto significantur.*

186. *Et si quidem judicati depressive agetur, tanti fiet vadimonium, quanti ea res erit; si vero ex ceteris causis, quanti actor juraverit non calumniæ causa postulare sibi vadimonium promitti, nec tamen pluris quam partis dimidiæ, nec pluribus quam sestertium cum milibus fit vadimonium. Itaque si centum milium res erit, nec judicati depressive agetur, non plus quam sestertium quinquaginta milium fit vadimonium.*

185. But recognizances (*vadimonia*) in certain cases are simple (*pura*), that is to say, without the giving of bail (*satisfactio*) in other cases with the giving of bail; in some cases an oath is taken, in other cases *recuperatores* are added, that is to say, that he who shall not have appeared on the day fixed will be immediately condemned by the *recuperatores* for the amount of the recognizance; and these individual cases are carefully distinguished in the edict of the Prætor.

186. And if indeed the *actio* is brought for a matter adjudged, or a sum paid, the recognizance will amount to the value of the thing in litigation; but in all other causes security is taken only for that amount which the plaintiff has sworn that he demands on good legal grounds (*non calumniæ causa*); still the recognizance (*vadimonium*) must not be for more than half the sum sued for, nor must it amount to more than 100,000 sesterces. (o) Therefore if the matter in dispute shall be of the value of 100,000, and if the suit shall not be for something already adjudged, nor for money paid, the recognizance shall not be for more than 50,000 sesterces.

(o) Assuming the value of the sestertius ($2\frac{1}{2}$ asses) at the time of Gaius to have been 1.875*d*. It will be seen that by this provision against excessive bail, the maximum in any suit would be about £780.

187. Quas autem personas sine permissu Prætoris impune in jus vocare non possumus, easdem nec vadimonio invitas obligare nobis possumus, præterquam si Prætor aditus permittit.

187. But those persons whom we cannot with impunity summon before the court without the permission of the Prætor, we cannot against their will compel to give security to us for their appearance, except the Prætor has granted permission to bring them before him.

(p) Justinian (Inst. iv. 16. 3.) tells us that a penalty of 50 solidi was imposed on children or freedmen who commenced a suit against their ascendant relatives, patrons or ascendants and children of patrons, without the Prætor's sanction. The edict of the Prætor ran thus: "Parentem patronum patronam liberos parentes patroni patronæ in jus sine permissu meo ne quis vocet." l. 4. Dig. de in jus. voc. (2. 4.) This protection extended to ascendants of both sexes, and of every degree, also to natural parents, and to an adoptive father, but not to the ascendants of an adoptive father. "Patris adoptivi parentes impune vocabit quoniam hi ejus parentes non sunt." ll. 6—8. Dig. tit. cit.; cf. also l. 7. Dig. de obl. et act. (44. 7.) Ulpianus says that the Prætor granted his permission generally "si famosa actio non sit, vel pudorem non suggillat;" further on he adds "permittere debet patronum in jus vocari a liberto si eum gravissima injuria affecit, flagellis forte cecidit." l. 10. s. 12. Dig. tit. cit. An *actio in factum* was granted to a patron against his freedman who had summoned him before the court. Gai. iv. 46; l. 25. s. 1. Dig. de obl. et act. (44. 7.)

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ERRATA.

24. In sec. 4, for *and has* read *and it has*.
25. Two lines from top, for *contain* read *contains*.
25. Sixteen lines from top, for *over* read *upon*.
25. Twenty-three lines from top, for *of* read *by*.
26. Twenty-seven lines from top, for *curia* read *comitia curiata*.
44. Three lines from top, for *Navi* read *Nave*.
44. Four lines from top, for *Romani* read *Romam*, and for *Claudi* read *Claudii*.
58. In sec. 49, for *rusus* read *rursus*.
71. In sec. 69, for *nupseret* read *nupserit*.
73. Eleven lines from top, for *civitatum Romanum* read *civitatem Romanam*.
75. Note *n*, for *Hadrian* read *Antoninus*.
77. Line 15 and elsewhere, for *Hermann* read *Heumann*.
102. Nine lines from bottom, for *in mancipio* read *into mancipium*.
103. Line 8, for *manum* read *manus*.
105. Line 13, for *diffareatio* read *diffarreatio*, and line 33, for *coemptio* read *conventio*.
106. In sec. 111, for *cautem* read *cautum*, and for *partem* read *partim*.
108. In sec. 114, for *comeptio* read *coemptio*.
109. Twenty-five lines from top, for *manu* read *manus*.
109. For *infirmatatem* read *infirmitem*.
110. Four lines from bottom, for *manum* read *manu*.
113. Two lines from bottom, for *manum* read *manus*.
118. Two lines from the bottom, read "Dabant agrees more closely with the subsequent adnumerabant, etc."
121. Ten lines from end, for *Domino* read *Dominio*.
122. Nineteen lines from top, for *crime* read *wrong*.
123. Line 7, for *dominum* read *dominium*.
127. In sec. 129, for *postliminium* read *postliminii*.
129. Note *a*, line 2, for *censum* read *sensum*.
140. Seven lines from the top, for *was obliged* read *had the power*.
142. Eight lines from top, for *Bechaus* read *Beckhaus*.
158. Three lines from top, for *tutorem* read *tutorum*.
158. Six lines from top, for *tutorem* read *tutorum*.
163. Note *w*, line 12, for *municipii* read *municipia*.
164. One line from top, for *municipii* read *municipia*.
175. In sec. 170, for *diminutio* read *deminuto*.
181. Twenty-three lines from top, for *Haubold* read *Haubold*.
193. Eighteen lines from top, for *Walther* read *Walter*.
207. Seven lines from top, for *pistinctions* read *distinctions*.
264. In sec. 54, for *possessione velut* read *possessiones ut*.
266. In sec. 54, for "also if it be land" read *even if it be land*.
310. In sec. 113, for *after* read *on*, and for *has gained* read *gains*.
318. In sec. 120, for *factus* read *factas*.
341. Twenty-four lines from top, for *vellit* read *velit*.
347. Note *k*, line 6, for *extraneus* read *extranei*, and for *potest* read *potestas*.
358. Note *o*, line 5, for *instituted* read *substituted*.
368. Twenty-three lines from top, for *mihi* read *meum*.
374. In sec. 195, for *vindicatio* read *vindicationem*.

381. In sec. 206, for *joint tenant* read *co-legatee*.
394. Five lines from top, for *videbantur* read *videbatur*.
396. In sec. 228, for *Caninio* read *Caninia*.
397. Line 7, for *inceptit* read *incipit*.
398. In sec. 234, for *qui iante* read *qui ante*: and in sec. 235, for *de nique* read *denique*.
405. In sec. 249, dele *a* before the word *fideicommissa*.
407. Three lines from top, for 289 read 270.
411. In sec. 253, for *fideicommissa* read *fideicommissum*.
413. In sec. 255, third line from end, for *against* read *to*; in the next line dele *to*.
416. In sec. 262, for *sit tamen* read *sit*. *Sunt tamen*.
418. In sec. 267, for *facerit* read *faceret*.
419. Seven lines from the top, for *interveneri* read *interveniri*.
428. In sec. 286, for *hereditatem* read *hereditatum*. In line eleven of translation from the top, after *as well as*, insert *legacies and*.
429. In sec. 289, last word, for *potset* read *potest*.
434. In sec. 10, line 13, for *consobrinis* read *consobrinos*.
439. In sec. 21, line 3, for *admissible* read *admissibile*.
442. In sec. 27, line 1, for *autum* read *autem*.
444. In sec. 28, line 1, for *ut quidam*, *putant* read *ut quidam putant*.
444. In sec. 31, line 1, for *adoptive* read *adoptiva*.
446. Twenty-four lines from top, for *patronare* read *patronave*.
448. Twenty-three lines from top, for *sons* read *son*.
449. Lines 23, 28, 32, for *in capite* read *in capita*.
454. In note *k*, for 760 read 780, and for 1·94 read 1·875.
455. In note *l*, line 4, for *sen* read *seu*.
455. In sec. 44, line 2, for *libertinus* read *libertinas*.
457. In sec. 47, line 2, for *viriles* read *virilis*.
457. In sec. 47, line 6, for *Papia* read *Papiae*.
459. In sec. 50, line 2, for *patrons* read *patrone*.
461. In sec. 56, line 11, for *peculium* read *peculii*.
464. Lines 4 and 17, for *capite* read *capita*.
470. In sec. 71, line 4, for *to* read *of*.
477. In sec. 79, line 15, for *dispose of* read *be deprived of*.
481. In sec. 85, line 5, for *the thing* read *each thing*. and for *who inherit debts* read *who are indebted to the inheritance*.
486. In sec. 89, line 7, for *consenu* read *consensu*.
486. In sec. 90, line 11, for *redantur* read *reddantur*.
486. In sec. 90, line 12, for *appellatur* read *appellatum*.
489. In sec. 96, line 4, for *civitatum* read *civitatium*.
490. In sec. 97a, line 4, for *inutili* read *inutilis*.
496. Nine lines from top, for *prommittisne* read *promittisne*.
545. In sec. 81, line 10, for *oportare* read *oportere*.
568. In note *i*, line 3, for *desuetudinem* read *desuetudinem*.
582. Six lines from the top, for *is* read *becomes*.
592. Three lines from the top, for *understood* read *thought*.
608. Note *e*, line 18, for *litgare* read *litigare*.
614. Eleven lines from the top, for *judicum* read *judicem*.
615. Line 18, for *jussesse* read *jus esse*.
743. Twenty-one lines from the top, for *ex jure civile* read *ex jure civili*.
752. Fourteen lines from the top, for *concessum* read *concessum*.
708. Fifteen lines from the top, for *sub* read *bus*.
51. In sec. 148, for *possidetis* read *uti possidetis*.



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